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FEDERAL JUDICIAL IMPROVEMENTS—1985

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HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE

OF THE

**COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES**

NINETY-NINTH CONGRESS

FIRST SESSION

ON

FEDERAL JUDICIAL IMPROVEMENTS—1985

JULY 29, 1985

Serial No. 24



Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1986

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FEDERAL JUDICIAL IMPROVEMENTS—1985

MONDAY, JULY 29, 1985

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 2 p.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier and Synar.

Staff present: Michael J. Remington, chief counsel; Joseph V. Wolfe, associate counsel; and Audrey Marcus, clerk.

Mr. KASTENMEIER. The committee will come to order.

This afternoon the subcommittee is meeting to consider numerous bills relating to various Federal judicial improvements. At first glance, these bills appear to make only minor changes in current law. However, these minor changes will dramatically increase the effectiveness and efficiency of the Federal judicial system.

For example, H.R. 2446 amends current law to provide that a Federal court, to which an action has been removed from State court, is no longer barred from hearing or determining a claim because the State court lacked jurisdiction over it. Thus, plaintiffs will no longer have to go to the expense of initiating a new action in the Federal court. It will also save Federal judicial resources by eliminating the need for a Federal court to dismiss the case and then commence the case anew.

Another bill will eliminate the requirement that judges disqualify themselves in class action suits because a family member is found to have a new financial interest in a class action. In the past judges have had to transfer years of work to a new judge to satisfy the requirement. The new judge then has to become familiar with the case before he or she can continue to proceed. This education process takes time, which impedes the functioning of the Federal judicial system.

A third bill, H.R. 3081 will improve the existing annuities programs for the survivors of Federal justices and judges. The Federal judicial system has lost highly respected judges due to the inadequate survivor's annuity program. Needless to say, losing competent judges also lessens the efficiency of the judicial system.

Other bills allow remarriage by surviving annuitants (H.R. 1472), payment of commuting expenses for justices and judges (H.R. 2187), allow actual travel expenses of justices and judges (H.R. 2561), provide that filing and miscellaneous fees for the U.S. District Court

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for the District of Columbia be collected in the same manner as in other U.S. District Courts (H.R. 2724), and provide for judicial review of certain orders of the Federal Maritime Commission and the Maritime Administration in the United States Court of Appeals (H.R. 3049).

Without objection, the text of all the bills that are subject of this hearing may be inserted in the appendix to this record. [See Appendix I.]

Mr. KASTENMEIER. Also, I would like to state that the subcommittee has received a number of written statements.

First, Congressman William Green submitted views on his bill, and, second, Congressman Jim Jeffords has presented us with his comments on the general issue of judicial survivor's annuity reform. Without objection, those statements will be made part of the record.

[The information follows:]

CONGRESSMAN BILL GREEN

H.R. 1472, BENEFITS FOR WIDOWED JUDICIAL ANNUITANTS

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND
THE ADMINISTRATION OF JUSTICE

JULY 29, 1985

Mr. Chairman:

I want to thank you and the Ranking Minority Member of the Subcommittee, Mr. Moorhead, for holding this hearing this afternoon. The subject of the hearings, how the federal government treats its judicial retirees and their survivors, is of great importance.

On March 7, 1985, I again introduced legislation designed to correct an inequity which has unfair effects on annuitants of our federal judges. H.R. 1472 is designed to correct an unintended loophole in the law.

The Social Security Amendments of 1977 (P.L. 95-216) and the Civil Service Retirement Survivor Annuities Reinstatement (P.L. 95-318) provided that widowed annuitants who had attained the age of 60 be permitted to remarry without losing their pension benefits. P.L. 95-216 provided that widowed annuitants on Social Security who had attained the age of 60 be permitted to remarry without losing their Social Security pension benefits, and P.L. 95-318 provided that widowed annuitants of civil service retirees who had remarried before July 18, 1966 have their pension benefits reinstated if such a person had attained 60 years of age.

Regrettably, when the 95th Congress made these changes, it failed to consider the predicament of widowed annuitants of federal judges 60 years of age or older who had or were contemplating marriage.

H.R. 1472 amends Section 376 of title 28 of the United States Code, relating to judicial annuities, to provide that annuities under such sections shall not terminate by reason of remarriage of an annuitant after attaining 60 years of age.

Current actuarial practice assumes that no remarriage after 60 is occurring among widows receiving benefits from the federal judges survivors plan. Thus, it follows from the actuarial assumption that maximum aggregate benefits are already being paid from the plan to widows over 60. Hence, the effect of a change permitting widows to remarry after age 60 without a loss in benefits would be negligible in actuarial terms, and would involve no additional expense above that currently projected for the system.

Identical legislation has been introduced in the Senate by Senator D'Amato of New York, and has been cosponsored by the Chairman of the Senate Committee on the Judiciary, Senator Thurmond of South Carolina. In addition, H.R. 1472 is cosponsored by my good friend, the Ranking Minority Member of the House Committee on the Judiciary, Representative Hamilton Fish, Jr. I urge this Subcommittee to approve H.R. 1472 without delay.

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STATEMENT OF CONGRESSMAN JAMES M. JEFFORDS ON H.R. 3081
A BILL TO REFORM THE JUDICIAL SURVIVORS ANNUITY PROGRAM
JULY 29, 1985

I'd like to take this opportunity to briefly express my support for H.R. 3081, legislation to reform and improve the existing annuities program for survivors of Federal Justices and Judges. It is my firm belief that this legislation is vitally important and I applaud my colleagues on the Subcommittee on Courts, Civil Liberties and the Administration of Justice for holding this hearing today to further explore the inequities of the current judicial survivors annuity system.

In my own state of Vermont the difficult situation faced by the widows of our Federal District and Circuit Judges has been brought to my attention on more than one occasion. More often than not, I find that I do not hear about the "pinch," as one of my constituents phrased it, until some unforeseen expense like a broken hip or other health problem, reduces any supplemental savings available to the widow leaving her to live on little more than her annuity.

And as you know, there is no realistic floor on the judicial survivor annuity benefit. As it is now, these survivors annuities range from adequate and modest to insufficient, particularly when compared with the benefits available to the survivors of civil service employees of comparable rank or members of Congress. A Federal Judge's surviving spouse could receive as little as \$118.75 per month, or about one third the amount available to our nation's most indigent seniors through the Supplemental Security Income (SSI) program.

As Judge William Hughes Mulligan explained when he resigned his office on April 1, 1981, "while I can afford to live on my salary, I cannot afford to die on it." Unfortunately, this sums up the sentiments of many members of the federal bench. The growing dissatisfaction with the program is most visible in the decreasing participation rate in the judicial survivor annuity program. Only 79 percent of the judicial officials on the roll were participating in 1982, down from a high of 91 percent in 1975. Also, should this number continue to slide, it will seriously jeopardize the solvency of the entire program.

I firmly believe that the changes outlined in this bill, particularly the establishment of a realistic floor for judicial survivors benefits, will make real progress towards a fair and equitable judicial survivors annuity system. While I realize that some adjustment may be necessary to bring H.R. 3081 into line with actuarial standards, I fully endorse the intent of this bill. I hope the Committee will act favorably on this legislation in the near future. It is time that Congress acted to correct the longstanding inequities in this system.

Mr. KASTENMEIER. Our first panel of witnesses represents the views of the Judicial Conference of the United States, and in addition the views of the Federal Judges Association. As far as the Judicial Conference of the United States is concerned, it has decided to send us an all-star team. The captain of the team, we understand, is Judge Elmo Hunter, chairman of the Committee on Court Administration. Judge Hunter has been helpful to the subcommittee for many years and has been a friend to this committee. He is flanked by two individuals who have not testified before this subcommittee.

First we have Judge Frank Coffin, a former member of the House of Representatives, with whom I was honored to serve in years past. Judge Coffin is an old friend and is now a senior circuit judge on the First Circuit Court of Appeals.

Also appearing is Judge Charles Clark, Chief Judge of the Fifth Circuit Court of Appeals. Judge Clark is chairman of the Conference Committee on the Budget.

We would also like to introduce, although he is not present at the witness table, Ralph Mecham, the new Director of the Administrative Office of the U.S. Courts. On behalf of the subcommittee, we are most pleased to greet you. We look forward to the continuation of a good working relationship that exists and has for some time between the subcommittee and the Administrative Office.

Also at the witness table is Judge Spencer Williams, who since 1982 has been president of the Federal Judges Association. Judge Williams serves on the U.S. District Court for the Northern District of California. He has a long and distinguished service in government service, most notably under Governor Reagan. While, therefore, the first three judges mentioned represent the Judicial Conference of the United States, Judge Williams separately represents the Federal Judges Association, although it may well be their views will not merge greatly.

In any event, we greet you all. We have received on behalf of the Judicial Conference of the United States a single statement. I understand that you have established divisional authority among yourselves. You may proceed as you wish.

TESTIMONY OF HON. ELMO HUNTER, CHAIRMAN, COMMITTEE ON COURT ADMINISTRATION, JUDICIAL CONFERENCE OF THE UNITED STATES; HON. FRANK COFFIN, CHAIRMAN, COMMITTEE ON THE JUDICIAL BRANCH, JUDICIAL CONFERENCE OF THE UNITED STATES; HON. CHARLES CLARK, CHAIRMAN, COMMITTEE ON THE BUDGET, JUDICIAL CONFERENCE OF THE UNITED STATES; AND HON. SPENCER M. WILLIAMS, PRESIDENT, FEDERAL JUDGES ASSOCIATION

Judge HUNTER. Mr. Chairman, thank you for that introduction. The documents which you have put into the record by consent include pictures of all of us, but we did need the introduction you made because the pictures bear very little resemblance to the occupants of the seats at this table.

First of all, I would be remiss if I didn't take note and say what I have said on many other occasions, although I know you don't like to have that sort of thing said very much or very often, and that is

the enormous debt of gratitude that the Judicial Conference and all of the judges that the Judicial Conference represents owe to you and this honorable committee for the very intelligent understanding, and the patient and meaningful reception you have given us over the years as we have brought to you, either at our request or at your request, the various problems of Federal judiciary. We look upon you as certainly one person, and upon this committee certainly as one committee, that fully understands the Federal judiciary and will go out of your way to understand our problems and to help solve them for the benefit of the public interest generally.

So, again, we are pleased to be here today and to have this opportunity.

Mr. KASTENMEIER. I should perhaps point out, Judge Hunter, that you were appointed district judge—the week after next or late next week—almost exactly 20 years ago, on August 11, 1965.

Judge HUNTER. As they say where I come from, "I have hardly become used to the 10-year mark, and here is the 20th one." Yes, that is correct. I will have my 20th soon. I was sworn in as a Federal judge August 20, 1965.

The procedure that we would like to follow, if you have no objection, simply is that we would first take up the three bills that I am going to very briefly mention: namely, H.R. 2446, the removal of jurisdiction matter; H.R. 3049, the Maritime Commission auditors' review; and H.R. 2724, fees and costs in the district court. Since I am talking, I might as well cover those.

Then we have the next subject, judicial survivors' annuities. We have two judges here who are going to speak on that subject.

As you have noted, Judge Frank Coffin is speaking on behalf of the Judicial Conference, and Judge Spencer Williams is speaking on behalf of the Federal judges group that he heads, and then we will be hearing from Chief Judge Charles Clark, who has two of the items on the agenda, H.R. 2187, the judges' commuting expenses; and H.R. 2561, reimbursement for official travel costs.

The last item on the agenda is H.R. 3044. Basically, Judge Howard Markey is our expert in that matter and he has done considerable work on it in the past. He is not here at the moment. If he arrives, I certainly hope you will hear him on that subject. If not, I will endeavor to cover it very briefly in his absence.

With regard to the bills that I am to cover, the first is H.R. 2446, the removal jurisdiction. I might say up front, Mr. Chairman, that the Court Administration Committee is meeting tomorrow, and we will be taking up that bill specifically. But I can go into it now because I can safely predict what will occur tomorrow, and I believe fairly safely predict what will probably occur in the Judicial Conference when it meets in September.

H.R. 2446 is a bill which would amend 28 U.S.C. 1441 to permit a civil action brought in a State court of which the Federal district court has exclusive jurisdiction as distinguished from concurrent, original jurisdiction, to permit that to be removed by a defendant or by defendants to the appropriate Federal district court. This bill would change the case law that has developed in connection with this particular subject by doing away with the old approach to jurisdiction and permit the civil action to be brought in the Federal

district court, even though the State court in which it commenced lacked jurisdiction.

I have covered pretty well on page 15 of our prepared statement to which you have alluded the specifics about it. But basically H.R. 2446 is a commonsense bill. If the case is brought where the State court does not have concurrent jurisdiction, the Federal courts don't have to dismiss it and thereby cause the attorneys to have to refile in the Federal district court with additional expense, loss of time and other resultant problems.

Mr. KASTENMEIER. Let me just interrupt to say for the record that H.R. 2446 is introduced by our colleague, Mr. Synar, the gentleman from Oklahoma.

Judge HUNTER. The Subcommittee on Federal Jurisdiction 2 weeks ago approved this bill. It is, as I said, a commonsense measure. I anticipate the Court Administration Committee will approve it in its meeting tomorrow, and I know of no reason why the Judicial Conference will not do so also. I believe that is all the detail I need give at this time with regard to this bill.

All of us will, of course, be available for questions after we complete our testimony.

Mr. KASTENMEIER. This has no relationship to diversity of jurisdictions.

Judge HUNTER. None whatsoever. I am ready on that subject, but I will spare you the details on that.

The next bill that I cover is H.R. 3049, dealing with the judicial review of Federal Maritime Commission orders. This is a bill which would amend 28 U.S.C. 2342 to provide for judicial review of certain orders of the Federal Maritime Commission and also the Maritime Administration by the U.S. Court of Appeals.

This bill was introduced by Congressman Rodino July 18 of this year, so we have not yet really had time to thoroughly evaluate it. On the other hand, I think again that I can say to you that although generally speaking we have some large groupings of situations where we prefer that matters go into the district court first and then onto the court of appeals, in this instance the particular situation is such that common sense again dictates that the appeals go right on to the U.S. Court of Appeals—as indeed they used to do.

Our quick look at it convinces us that there was simply an oversight that was made when the Shipping Act of 1984 bill was passed, and the old appeal routes that used to exist were left out of that bill in the main, and this would simply restore them. In other words, the bill provides for something we are used to, it is something that has been in place for a number of past years, and it certainly does not give any threat of increased caseload to the appeals courts. So although generally we have a different view about putting reviews directly in the court of appeals, in this instance we believe that there is no reason why it shouldn't be done.

I wouldn't want to guess what the Judicial Conference would do with it, but as I say, I now know of no reason why they wouldn't approve it.

My last bill that I wish to comment on in these brief remarks is H.R. 2724. This is a bill which would amend 28 U.S.C. 1914 to repeal that part of that act that treats District of Columbia costs

and filing fees differently from the cost and filing fees in all of the other U.S. district courts in the Nation. It came about through a historical situation.

As you know, the District of Columbia District Court has worn several hats throughout the years, and it has finally reached that place where there is no longer any reason remaining to not have it have the same costs and the same filing fees as any other Federal district court in the Nation. The Judicial Conference of the United States has actually supported this change commencing in 1976, and you may be sure they will continue to support it and do now support it.

That pretty well covers the three that I have, with the possible exception of Judge Markey not arriving to speak on H.R. 3044. So at this time, with your permission, I suggest that Judge Coffin and Judge Williams take over in the order in which they determine.

Judge WILLIAMS. Thank you, Mr. Chairman.

I would like to echo and endorse the remarks of Judge Hunter insofar as our deep appreciation of the time and attention and consideration you have given to the problems of the Federal judiciary. We are indeed indebted to you and thank you for all you have done on our behalf.

This is my first appearance before this committee, and I am pleased to be here. As you indicated at the introduction, I am the president of the Federal Judge's Association at the present time. It is a voluntary grassroots organization whose membership now includes almost 50 percent of all active and senior article 3 judges from the various districts, circuit and special courts, in the Federal judiciary.

The members of the association are pleased that we have been offered by this request to express our views on this important legislation. I would like to talk briefly about the survivor's annuity bill first and then after that about the per diem request.

On the issue of judicial survivors, I wanted to stress two points. One is the damaging effect the survivor's program can have on the quality of the Federal judiciary. And the second is the terrible inadequacy of the present program.

We believe that persons who are considering either joining or leaving the Federal bench weigh, among other things, what the effect of their decision will have on the well-being of their wives and children. The decision of a candidate for judicial office to accept a Federal judgeship and the decision of an incumbent to stay or not to stay in judicial office, when faced with an attractive offer to return to private practice, turn in large part on what each must give up in the way of income and other benefits for the honor and the privilege and the satisfaction of serving his or her country as a Federal judge.

An additional equally compelling question is what that candidate or incumbent will require his spouse and children to give up so that he or she may accept or continue to serve as a Federal judge.

The program presently offered to survivors of deceased Federal judges is so bad that it is embarrassing. Under the present program, the survivor of a deceased judge receives 1 1/4 of 1 percent of the deceased judge's annual salary for each year of judicial service. In other words, assuming a salary of \$76,000, the survivor of a dis-

strict court judge who served 5 years would receive \$395 a month for her support. After 10 years, it would go up to the astronomical amount of \$792 for her support. These survivors would receive an additional \$125 per month for each minor child up to a maximum of three children. I have six kids, and I can't imagine supporting a minor child on \$125 a month.

To say that these benefits are inadequate is a gross understatement. For those forced to live through them and through this embarrassment, however, the effects can be devastating. Take, for instance, the case of Tibby West. In 1981, Blake West, a very bright partner in a large New Orleans law firm left private practice to become a Federal judge. He was an exceptionally fine catch for the Federal judiciary. He and I attended judicial boot camp together, that is what they call the—officially known as the Seminar for Newly Appointed Federal Judges.

Anyhow, we became good friends and tried to keep in touch as best we could over the years. Judge West died after 7 years of judicial service. I contacted Tibby and asked her to comment on the problems of trying to survive on the benefits accruing under the program. She would not have spoken out if I had not contacted her, and she had nothing to gain or lose by her comments, because this legislation will not help her in any way.

But she was willing to tell a story in the hope that future survivors of deceased judges will be spared the agony and embarrassment having been dealt her. I would like to read her letter.

DEAR SPENCER: When Blake died in January, after seven years on the Federal Bench, he was survived by myself and four children, two in college, one in the senior year in high school, and a daughter who had just graduated from college. After his death, my problem was not only how to live myself, how to see to it that all three of the younger children continued their education. This obviously was impossible on the approximately \$550 a month we were receiving from the judicial survivors fund. I went to work as a saleswoman in a local store, the children worked both part and full-time, we used the entire proceeds from Blake's life insurance, and after two years, sold the family home.

Four years have now passed since his death, most but not all of the education burden has lifted, all of the children have reached the age of 22, which is the cutoff point for survivor's benefits. We have used all monetary resources, and I am receiving \$508 per month as Blake's sole eligible survivor. With the happiness of Blake being appointed as United States District Judge, we did not look ahead to foresee that this could happen. I hope that the new judiciary survivors' plight will be remedied so that no able attorney, which the Federal Bench needs now so much, would ever be deterred from accepting one of this nation's most honored positions.

Most sincerely, Tibby West.

The great bulk of the benefits from the proposed bill will go to the younger judges whose survivor benefits will jump to 34 percent. The judge who has served 20 years or more will receive comparatively little income in return for his contribution. But the older judges I represent wholeheartedly support the measure because they believe it will help preserve the quality of the Federal bench and that it is foremost in the thinking of every judge who discussed this matter with me.

We all sympathize with Congress over the difficult budgetary problems it must face during these trying times. One is compelled to ask, how can anyone ask for a budgetary increase or a program improvement during these times when so much trimming has already been done and even more reductions are sought? However,

we all know that sometimes we can save money by spending money. Although the actual savings realized by paying a little more to keep a tech sergeant or a doctor or a judge or a Member of Congress on active duty rather than allowing them to quit are difficult to quantify, they are real savings and the expenditures are justified. Keeping that experience on board can produce, and I submit that is the situation we face here, can produce positive cost effective results.

There are several items I did not put in my statement I would like to add. I also believe the committee should study the provision that prevents survivors from receiving the benefits of a judicial salary increase unless that increase equals 5 percent. In other words, as the law stands now, if a judge receives a raise of 5 percent or more, the survivors will get 3 percent. But if the judge receives less than 5 percent, the survivors receive nothing, no additional amount whatsoever.

For instance, if we have three successive COLA quotas of 3.5 percent over the 3 years, the judges would receive 10.5 percent. The survivors would receive nothing, no increase whatsoever. I think that is a terrible inequitable situation and should be studied by this committee to arrive at a fairer result.

Also I think to make the program more competitive, and it is not competitive right now—to make it more competitive and to increase the level of judicial participation, I would ask the committee to consider allowing the first \$2,200 of contributions to the program to be treated for tax purposes as an IRA or Keogh plan. It is not done now. I think that would be helpful. I know many lawyers in private practice have plans like that set up. I think that would help this program if it were made a possibility.

Speaking to the increase in travel allowances, we are all aware, very much aware, of the various battles that have been and are being fought over inadequate judicial salaries and benefits for our survivors. Well, in addition to these problems, Federal judges are often forced to absorb a good part of their living expenses, which are incurred while traveling on judicial business. In many parts of the country, including my California, and right here in the Nation's Capital, the maximum allowable per diems do not cover hotel costs. The maximum reimbursement for hotels and meals, if itemized, is \$75 per day; if not itemized, \$50 per day. In many areas of the country, however, the cost of the hotel room alone well exceeds \$75 per night. Thus, judges must pay any additional hotel costs plus cost of meals.

I cannot strongly enough stress that we are not discussing voluntary, frivolous or vacation travel, but mandatory travel required in the course of performing official duties. It is blatantly unfair and possibly unconstitutional to require judges to bear their own expenses under these circumstances.

I would like to illustrate my point, for example. Chief Judge Tony Alaimo of the Southern District of Georgia spends up to one-third of the year trying cases away from his duty station. Hotels are at least \$80 per day. Yet every dollar he spends over the maximum reimbursement of \$75 a day comes out of his own pocket. We are talking about absorbing cost for up to 4 months of the year in his particular case. Even assuming Judge Alaimo is spending a

very modest estimate of \$30 additional a day, this can easily add up to \$2,100 per year. These are funds which are never reimbursed.

Consequently, judges who can ill afford it are in effect subsidizing the Government on salaries that aren't too high to begin with. The Federal Judges Association estimates an average judge spends between 8 and 10 percent of the year engaged in official travel. Some travel more some travel less, but many judges must hear cases in other parts of their district. All active judges must also attend circuit conferences once a year. These generally last 4 days and constitute an additional expense the judge must absorb.

Judges also must attend various training conferences each year, which last up to 5 days, when you include travel time. I might add attendance at all these conferences is mandatory. The \$75 maximum reimbursement is unrealistic. Judges are required to travel to carry out their judicial duties and should not be forced to bear the expense of mandatory travel. We are not asking for luxurious accommodations and meals. Judges are required to and do exercise the same care incurring expenses that a prudent person would exercise in conducting personal business and should not be forced to subsidize the government even in these tough budgetary times.

This concludes my remarks, Mr. Chairman. I want to say again how much I appreciate the opportunity to bring the views of the association to your attention.

Mr. KASTENMEIER. Thank you, Judge Williams, for your remarks.

I know that your counsel, Tom Railsback, was formerly a member of this committee.

[The statements of Hon. Spencer Williams follows:]

STATEMENT OF
HONORABLE SPENCER WILLIAMS
UNITED STATES DISTRICT JUDGE, NORTHERN DISTRICT, CALIFORNIA
PRESIDENT, FEDERAL JUDGES ASSOCIATION

BEFORE THE
HOUSE OF REPRESENTATIVES SUBCOMMITTEE
ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION
OF JUSTICE OF THE COMMITTEE ON THE JUDICIARY

ON H.R. 3081

AMENDMENT OF THE
JUDICIAL SURVIVORS ANNUITY PROGRAM

STATEMENT OF
JUDGE SPENDER WILLIAMS

My name is Spencer Williams. I am a United States District Judge from San Francisco and appear before you today on behalf of the Federal Judges Association, of which I am President.

The members of The Federal Judges Association are pleased and grateful that this Committee has requested an expression of their views on this most important legislation.

The Federal Judges Association was organized and incorporated in 1982. It consists of almost 400 active and senior Article III judges from the various District, Circuit and Special Courts in the Federal judiciary. We currently represent almost half of the members of the federal judiciary. The Association is a "grass-roots" organization, whose stated purpose is to seek the highest quality of justice for the people of the United States. The FJA's Constitution declares that preserving and protecting the ability of the Federal judiciary to attract and retain the best qualified men and women for judicial service

is critical to attaining that purpose.

And that is why I am here today.

We believe that persons who are considering either joining, or leaving, the Federal Bench will weigh, among other things, what effect their decision will have on the well-being of their survivors.

The decision of a candidate for judicial office to seek or accept a Federal judgeship, and the decision of an incumbent judge to stay or not to stay in judicial office when faced with lucrative and otherwise attractive offers to return to private practice, turn in large part on what each must give up in the way of income or other benefits, in exchange for the honor, the privilege, and the satisfaction of serving his or her Country in this most important office.

An additional, and equally compelling question is what that candidate, or incumbent, will require his or her spouse and children to give up so that he or she may accept or continue to perform judicial service.

The program presently offered the survivors of deceased Federal judges is so bad and inequitable that it is embarrassing.

Under the present program the survivor of a deceased judge receives 1-1/4 per cent of the deceased judge's annual salary for each year of judicial service. In other words, assuming a salary of \$76,000, the survivor of a District Court judge who served five years would receive about \$4,750 per year (\$395 per month). After ten years it would go to \$9,500 (\$792 per month). Survivors would receive an additional \$1,500 (\$125 per month) for each minor child up to a maximum of three children.

To say that these benefits are inadequate is an understatement. For those forced to live through this embarrassment, however, the effects can be devastating. Take, for instance, the case of Tibby West. In 1971, R. Blake West, a very bright partner in a large New Orleans law firm left private practice to become a Federal judge. He was an exceptionally fine catch for the Federal judiciary. We attended judicial boot camp,

officially known as a seminar for newly appointed federal judges, together, became good friends and kept in touch as best we could over the years. Judge West died after seven years of judicial service.

I contacted his widow and asked her to comment on the problems of trying to survive on benefits accruing under the Judicial Survivor's Annuity Program. The poignant letter of Mrs. Blake West is attached for the record. Mrs. West would not have spoken out if I had not contacted her. She has nothing to gain or lose by her comments because this legislation will not help her in any way. She was willing to tell her story in the hope that future survivors of deceased judges will be spared the agony and embarrassment that befell her.

Gentlemen of the committee, it could be argued that her husband came on the Bench with his eyes open . . . and that although it's tough, it's just the rub of the green, as they say in golf . . . too bad! Of course the answer is that present survivors will not benefit, only future survivors . . . and that

solving this problem may make the difference of whether a highly qualified candidate accepts or rejects a federal judgeship, or whether a sitting judge will stay on the Bench, or resign.

I am sure there are many judges and attorneys in the Second Circuit, who felt a great loss when Judge William H. Mulligan resigned. And although his quotation has been repeated often, I believe it should be repeated one more time to help make my point, for he said: "I can afford to live on the salary of a Federal judge, but I can't afford to die on it."

Futhermore, as a matter of national pride, we should not tolerate the idea of ever again having to create make-weight jobs so that the impoverished widows of Federal judges - or Supreme Court Justices - can survive.

While the bill before you today would not solve all the problems, it goes a long way in that direction, and I commend its authors, as well as Chief Justice Warren Burger and Judge Frank Coffin for their individual and collective efforts to right this wrong; to remedy this disgraceful situation.

H.R. 3081 will increase each district judge's contribution from 4.5 per cent to 5 per cent or from approximately \$3,420 to \$3,800 per year. Circuit judges and Supreme Court Justices would pay, based on their higher salaries, proportionately more. The Bill would also increase the benefits earned for each year of service from 1-1/4 per cent of annual salary to 1-1/2 per cent. The most noteworthy and necessary provision, however, is that there would be a minimum allowance of 30 per cent of average high three year salary, or \$22,800 for the survivor of a district judge. The need for this floor, to protect the survivors of judges who die at a relatively early age, cannot be over-emphasized. The maximum allowance would be 55 per cent of average high three year salary, or approximately \$41,800, for district judges, which would take between 36 and 37 years of judicial service to earn. Neither would put a survivor in the lap of luxury, but we are not seeking luxury, only equity.

In preparing for today's presentation I called some of San

Francisco's larger law firms and asked how they provided for the survivors of deceased partners. The information received to date is insufficient to support any solid conclusions, but a pattern does seem to exist:

- Most of them carry group life policies on their partners. These are paid for by the firm and run as high as \$500,000 per partner.
- Most provide that a spouse will receive the decedent's vested share in the partnership (accounts receivable plus work in progress).
- Most take maximum advantage of Keogh Plans.
- Individuals often supplement this coverage at their own expense.

Furthermore, while attributable to their individual higher earning power more than to any other single factor, survivors of these partners will receive two to three times the annuities received by survivors of Federal judges, even under the greatly improved plan contained in H.R. 3081.

The great bulk of the benefits of this bill will, of course, go to the younger judges, whose survivors' benefits will jump from 1-1/4 per cent of salary after 18 months, to 30 per cent. The judge who has served 20 years, or more, will receive comparatively little in return for his increased contribution. But the older judges I represent wholeheartedly support the measure because they believe it will help preserve the quality of the Federal Bench, and that is foremost in the thinking of every judge who has discussed this matter with me.

The judges for whom I speak sympathize with Congress over the difficult budgetary problems it must face during these trying times. One is compelled to ask "How can anyone ask for a budgetary increase, or a program improvement during these times when so much trimming has already been done, and even more reductions are sought?" I personally empathize with Congress over this problem, having been through the same struggle, although from the executive branch perspective, in California

during the late sixties. However, we found out then, and know now, that sometimes we can save money by spending money. Although the actual savings realized by keeping a Tech Sergeant, or a Chief Bosun, or a Doctor . . . or a judge on active duty rather than allowing them to retire, or quit, are difficult to quantify . . . most of us admit that the savings are real, and the expenditure justified. Keeping that experience on board usually has positive cost effective results.

Gentlemen, this concludes my remarks. I again want to say thank you for this opportunity to bring the views of the members of the Federal Judges Association to your attention. If you have any questions, I will endeavor to answer them. Thank you.

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AMENDED
STATEMENT OF
HONORABLE SPENCER WILLIAMS
UNITED STATES DISTRICT JUDGE, NORTHERN DISTRICT, CALIFORNIA
PRESIDENT, FEDERAL JUDGES ASSOCIATION

BEFORE THE HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY

ON H.R. 2561

TO PROVIDE ACTUAL TRAVEL EXPENSES
FOR FEDERAL JUDGES

JULY 29, 1985

AMENDED
STATEMENT OF
JUDGE SPENCER WILLIAMS

My name is Spencer Williams. I am a United States District Judge from San Francisco and appear before you today representing the Federal Judges Association, of which I am President.

The Federal Judges Association is a voluntary "grass roots" organization whose membership includes almost fifty per cent of the active and senior Article III judges from the various District, Circuit and Special Courts in the Federal judiciary. The members of the Association are pleased that this committee has requested an expression of their views on this important legislation.

We are all very much aware of the various battles that have been, and are being, fought over inadequate judicial salaries and inadequate benefits for our survivors. Well, in addition to these problems, federal judges are often forced to absorb a good part of the living expenses they incur while traveling on judicial business. In many parts of the country, including my native California and right here in the Nation's Capital, the

maximum allowable per diems do not cover hotel costs, much less total actual expenses.

The maximum reimbursement for hotel and meals, if itemized, is seventy-five dollars per day. (If not itemized, the maximum is fifty dollars per day.) In many areas of the country, however, the cost of a hotel room well exceeds seventy-five dollars per night and thus judges must pay any additional hotel costs as well as costs of meals.

I cannot strongly enough stress that we are not discussing voluntary, frivolous, or vacation travel, but mandatory travel required in the course of performing official duties. It is patently unfair and possibly unconstitutional, to require judges to bear their own expenses under these circumstances.

I'd like to illustrate my point with an example. Chief Judge Anthony Alaimo of the Southern District of Georgia spends up to one-third of the year trying cases away from his official duty station. Hotels are at least eighty dollars per day, and it is almost impossible to eat for less than thirty dollars per

day. Yet every dollar he spends over the maximum reimbursement of seventy- five dollars a day comes out of his own pocket. We are talking about absorbing costs for up to four months of the year in this particular case. Even assuming Judge Alaimo is expending a very modest estimate of thirty-five additional dollars per day, this can easily add up to an additional \$2,100 per year. These are funds which are never reimbursed. Consequently, judges, who can ill afford it, are subsidizing the government out of salaries that are too low to begin with.

The Federal Judges Association estimates that on average, judges spend between 8 to 10 per cent of the year engaged in official travel. Some travel more, some travel less, but many judges must hear cases in other parts of their district.

All active judges must also attend circuit conferences once a year. These generally last four days and constitute an additional expense judges must absorb. Judges also must attend various training conferences each year, which last up to five days when you include travel time. I might add that attendance

at all of these conferences is mandatory.

The seventy-five dollar maximum reimbursement is simply unrealistic and inequitable. Judges are required to travel to carry out their judicial duties and should not be forced to bear the expense of mandatory travel. We are not asking for luxurious accommodations and meals. Judges are required to, and do, exercise the same care incurring expenses that a prudent person would exercise in conducting personal business. And they should not be forced to subsidize the government, even in these tough budgetary times.

This concludes my remarks. I again want to say thank you for this opportunity to bring you the views of the members of the Federal Judges Association. If you have any questions, I will endeavor to answer them. Thank you.

Mr. KASTENMEIER. Judge Coffin, did you wish to proceed?

Judge COFFIN. Mr. Chairman, I echo the comments of both Judge Hunter and Judge Williams about the usefulness of this particular subcommittee and the respect which the Judiciary has for it. I regret to say I think you are almost alone. I think we are living in about as difficult a time institutionally as I can remember. The judges that I see as chairman of the Committee on the Judicial Branch, are not in any state of crisis or riot or rebellion, but there is a deepening—bone-deep frustration, and it is hard to put one's finger on it.

As a Member of the House, I think I liked and respected almost everyone I knew here. In the judiciary, I like and respect almost everyone that I have met there. You get judges like Judge Hunter and Judge Clark who have committees who deal constantly with the Congress, and I think that their experiences have been overwhelmingly solid and constructive. They feel they have a good relationship, and I know that they do.

In fact, there was a recent article written about the operations of the Judicial Conference Budget Committee and the effectiveness of bridging the gap between Congress and the judiciary without violating the independence of either body. But apart from these minicosms, I just sense that there is on the whole a deepening lack of respect for the judiciary. It is most evident in the persistent failure to adjust compensation of the judiciary and also of yourselves, the failure to give a cost-of-living allowance when other branches get it. The overwhelming problem is not that of myself or other judges who are older and are over the hump in terms of educating their family and providing for their survivors, but it is a grievous one for the young judge with children.

I know quite a number who have reached the end of their rope in terms of expending their own capital, and if nothing happens in the fairly near future, we are going to lose them. We probably can get all the wealthy people to be judges that we will need, and we probably can get a lot at the other end of the economic spectrum to whom the judicial and congressional salary level looks exceedingly good. But if we go along that route, we are cutting out the great middle class, middle level income lawyer who really represents a very broad spectrum of society.

So against that dismal background, this committee is a ray of hope. Maybe you are only putting your finger in the dike on these miscellaneous provisions that are coming before you, but putting your finger in the dike sometimes can have historic significance, and I think that you are perhaps building more solidly than even you realize.

On annuities, I think Judge Williams provided you with a very succinct and accurate statement as to what would be done, and the inadequacy of the present system. We are not talking about a terribly big program. I have been handed some figures from the Administrative Office that indicates that the total cost of everything in this Judicial Survivor's Annuity Program is under \$5 million. We have 668 judges participating as of June 10, 1984. Their mean salary, if we strike an average between district and circuit judges—which overestimates the cost, because there are far more district

judges—is \$78,000. And, as you know from the bill itself, the benefits package cost to the Government is 8.816 percent of the salary.

The judge's contribution has been upped from 4.5 percent to 5 percent. The total cost, we estimate, from this package is 13.16 percent of salary of which the Government would pay 6.18. And the final arithmetic is multiplying \$78,000 times 668 judges times 8.816 percent equals \$4,251,686.40. And that is an overestimate because we have not weighted the salaries of district judges versus those of the circuit judges.

The most important parts of the program that you will be asked to vote for are to increase the contributions of judges to make the plan more solvent, so it will increase the floor for surviving spouses to 30 percent so that a surviving spouse instead of getting the figures that Mrs. Blake West reported to Judge Williams or that former Judge Mulligan reported when he resigned from the judiciary because he could afford to live on the salary, but he couldn't afford to die on it—instead of \$4,000 to \$7,000 for a widow of a judge who had served, say, 8 to 10 years, the amount would go up to \$20,000.

The floor for children with a surviving spouse would go from \$1,500 per child for, if it were an only child, to \$7,600. If only children survived, then the figure for a single child would go from \$1,860 to \$15,200. The ceiling is increased from 40 to 55 percent. That really doesn't amount to much, because there are going to be very few judges serving more than 32 years.

The bill before you is a very modern bill in that it does not cut off a surviving spouse if that spouse remarries after 60. If he or she remarries before 60, that is naughty, and, therefore, he or she loses everything. So we don't think we are being overly radical in asking you to allow freedom of choice after 60.

Social Security and civil service retirement programs now have taken the enlightened step, or you have taken the enlightened step in the Congress of allowing 55 as the cutoff, and we would certainly feel that probably the best figure is 55 rather than 60. Those are the main provisions. Now, I would like to just add three things: Judge Williams made the first point, that the cost of living precondition of a 5 percent increase before there is any adjustment in survivor's annuities ought to be stricken. Just as it is no longer part of the civil service retirement program, although it is not in your present bill, we would urge that you consider that.

A second provision would be if a judge dies within 18 months, the program doesn't vest at that point, he loses everything. It seems to me, particularly against the background of the salary situation that we presently face, if a 45-year old person has become a Federal judge and has taken his reduction in income and then dies within 18 months, his spouse or her spouse really ought to share in this program. Our actuarial expert worked with the administrative office, Robert Myers, said that would cost very, very little indeed. It doesn't happen very often, but when it does, it would be disastrous for the spouse. We urge that.

And, finally, we urge you to give attention to the problem of the judge who has no spouse to survive him and whose children are all grown, and yet he is contributing to the system, and the fairness of

that should be assessed with the objective of seeing whether or not it wouldn't be possible to enable him to withdraw at that point.

On travel, I really cannot add to what Judge Williams said, and with some experience in knowing what Judge Clark is able to do, I have a feeling he is going to cover that subject very adequately. That is all I have.

Mr. KASTENMEIER. Thank you, Judge Coffin.

Judge Clark.

Judge CLARK. Thank you, Mr. Chairman.

Let me say at the outset, as my colleagues have said, this, to have my first appearance before your committee is an honor and pleasure. We have long known you as the friend of the judiciary, and this committee as its staunchest supporter.

The first bill that I would like to speak to is H.R. 2561, which you and Mr. Moorhead have proposed. It is, I believe, a request to modernize the travel and expense feature that is now applicable to judges. Public Law 96-246 was enacted on September 10, 1980, and it permitted the reimbursement of expenses up to a total of \$75. Previously the limit had been \$50. But things have changed since 1980.

As you know, in your life and as judges know, particularly in their travel lives, hotel rooms that were formerly \$50 a day are now frequently \$85 and \$90 a day when you can weedle a hotel that is near the courthouse into giving you a "government" or a reduced rate.

The financial management section of the administrative office has got actual cost figures on 1984 travel. The subsistence figure for all of 1984 for all judges, all article 3 judges, was \$1.543 million. We are in a satisfactory position to estimate the 1985 travel expenses, and we estimate that that figure will only be \$1.550 million. This shows you that travel expenses are level, and this is because it is largely against the ceiling that is already there.

There is a private group called Runzheimer that makes annual surveys of meal and lodging costs throughout the United States. The 1984 edition of the Runzheimer Survey was featured on this morning's front page of the USA Today newspaper, to the extent of telling us that the travel expenses to three cities the judges regularly travel to, one of which is Washington, DC, have risen pretty high. The Runzheimer Survey for 1985 shows for Manhattan, the average travel expense, and this is not the best lodging, but just satisfactory lodging, a room in a first-class hotel and three meals, is \$199.30. Washington, DC, for the same expenses, \$154.65. So you can see that the cost of judges doing the business that they are assigned to do has increased dramatically.

What I would urge is that the committee give serious consideration to your proposed legislation not just for the effect on incumbent judges, though I am sure all of us who are in office now feel this pinch acutely, but principally for those people who are considering the Federal judiciary as a career. As Judge Williams says, we are soon going to have a cadre of Federal judges composed of the independently wealthy and the mediocre because you are not going to be able to attract a lawyer who is at the top of his profession, at the time in his career when you really want him to come into the

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Federal judiciary and serve for a period of 15 to 20 years, so you get the most effective benefit of his service.

If he is making \$200,000 practicing law, you are asking him to take a salary of \$76,000 and you are asking him to pay part of that money back in order to carry out the duties of his office. So my main concern is not on those of us who have already been in the trenches, but on who you attract to be judges.

Again, turning to the financial management section of the administrative office, I have requested that they estimate the cost of this legislation, and I was surprised at the results. The Runzheimer Survey characterizes the entire United States, by different sizes of cities, into five different categories from over 1 million to under 100,000, and they divide the costs and secure an average cost of the cities surveyed. That average cost for all cities across the United States is \$90.41. Assuming that Runzheimer is accurate in his survey, this would be a 20-percent increase over the actual expenses that are now claimed by judges up to and including the \$70 level.

We calculate that H.R. 2561 would cost \$310,000 a year. We think that that is a relatively small, though significant, cost for modernizing travel expense reimbursement for the Federal judiciary.

I would like to suggest, Mr. Chairman, if I can be so presumptuous, an amendment in the last sentence of the bill you have suggested—and I have a copy of the text I would suggest here. I would add the word "reasonable" before the word "subsistence" in that last sentence, so it tells the director to take into account the cost of transportation and reasonable subsistence generally incurred for travel.

It is certainly not the desire of the judiciary to occupy a suite in a hotel or to eat the finest meal in the best restaurant at the expense of the taxpayers. All we want is a chance to recover reasonable expenses that are actually incurred.

But in any event, I would say, Mr. Chairman, that even though the Judicial Conference of the United States has not taken a position on this legislation as yet, it certainly is a welcome ray of sunshine to all of those of us who are presently serving, and I think, as I say, it is a more important incentive to those who might be considering the Federal judiciary for a career.

The last bill that I would like to comment on is H.R. 2187. This is a bill that was introduced by Congressman Ralph Hall. It provides for reimbursement of commuting expenses where a judge's place of abode is not more than 300 miles from his official duty station. Again, this is a piece of legislation that the Judicial Conference has not taken a position on. I do not speak here now as the Chairman of the Budget Committee even; I speak only as a judge who has the obligation of administering the second largest circuit in the United States, the Fifth Circuit Court of Appeals and the district courts in that circuit.

We know that title 28 U.S. Code, section 134(c), provides that if the public interest and the nature of the business of a district court require that a district judge maintain his place of abode at or near a particular place for holding court in the district or in a particular

part of the district, the judicial council of the circuit may so declare and make an appropriate order.

Every time that there is a vacancy in the fifth circuit, and this is true in other judicial councils, too, we consider the needs of the district, and do so before any appointment is made, before it is ever known that Mr. Smith or Mr. Brown or Mr. Jones is going to be the person considered for that particular nomination. We advise the Justice Department and the Senator or Senators involved, of any determination that we would make of where that judge's place of abode should be.

We want the judge to live where the business is. Judging is not an 8-hour-a-day game. It is significant to the interest of justice that insofar as you can—in some districts it is not possible because the district is rural and very widespread and there is a great geographical area that pulls on that judge—where it is possible for a judge's attention to be devoted to a single place, we know that the interest of justice require that he be available to the lawyers and to the litigants in that area as much of his time as he can be.

There are all sorts of reasons why: Temporary restraining orders, injunctions, procedures during the course of a lawsuit requires that the judge to be available to the litigants. This is what we take into account in making that sort of determination. We tell everybody involved we think that the judge ought to maintain his place of abode at this place of holding court—Jackson, MS, or wherever.

This legislation swims entirely contrary to that notion. This would encourage a judge to maintain a place of abode at a different place from his official duty station. I think that it is the wrong perception because, as I say, I speak only for the Fifth Circuit Judicial Council and myself as an administrative judge.

I would hope that the legislation would not receive your favorable approval, though I am much inclined to everything else that has been brought up here today.

Thank you very much.

[The statement of the Judicial Conference of the United States follows:]

PREPARED STATEMENT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, CONCERNING H.R. 1472, H.R. 2187, H.R. 2445, H.R. 2561, H.R. 2724, H.R. 3044, H.R. 3049 AND PROPOSED AMENDMENTS TO 28 U.S.C. § 376

DRAFT BILL — JUDICIAL SURVIVORS' ANNUITIES

The Judicial Conference supports enactment of all proposed amendments to 28 U.S.C. § 376 embodied in the draft bill. While stylistically distinguishable, the draft bill is substantively identical to a draft bill to amend section 376 of Title 28 which the Judicial Conference formally transmitted to the Speaker of the House on August 3, 1981. A complete copy of that August 3, 1981 transmission to the speaker is attached to this statement as Appendix A. We should also note that the pending draft bill is also, with one minor exception, substantively identical to S. 1392, which Senator DeConcini introduced on June 27 of this year. Before addressing the specific amendments to existing law which would be achieved by all three proposals, several comments concerning the Judicial Survivors' Annuities program are warranted.

Created by Congress in 1956 (Act of Aug. 3, 1956, Pub. L. No. 84-973, 70 Stat. 1021), after six years of consideration in both the House and the Senate, the program embodied Congress' recognition of the need to make available to judges an elective arrangement for providing survivorship benefits for their spouses and children. Completely revised and reformed in 1976 (Act of Oct. 19, 1976, Pub. L. No. 94-334, 90 Stat. 2803) — in large part due to the endeavors of this subcommittee under Chairman Rostenbier's leadership — the program became, for all judges, an example of Congressional responsiveness to judicial apprehensions concerning their ability to provide a reasonable degree of material security for their families in an era of diminishing purchasing power and infrequent salary increases.

In 1976 Congress clearly believed it had established a program which would be an attractive enough investment to insure participation by all judges "shopping for" survivors' annuities protection for their families. That belief was based upon the premise that annuities payable would be regularly and predictably adjusted to reflect inflation in direct correlation to the extent to which judicial salaries increased in response to inflation. One year before enactment of the 1976 reforms, Congress had passed legislation authorizing annual "comparability adjustments" in federal judicial salaries (Act of Aug. 9, 1975, Pub. L. No. 94-82, Title II, § 205, 89 Stat. 422).

The premise — and the promise — of annual adjustments in salaries, which would provide correlated adjustments in annuity benefit payments, did not prove reliable. Commencing in the same year in which the reforms were enacted — in 1976 — annual "comparability adjustments" in judicial salaries — and in Congressional salaries as well — were routinely precluded by various legislative or executive actions taken in response to immediate economic or political perceptions and pressures. As a result, annuity payment amounts have not increased as anticipated. The purchasing power of the dollar has continue to diminish. The "investment attractiveness" of the program has been eroded, as commercially marketed alternatives, such as investment retirement accounts, have understandably appeared to judges to be "better buys for the dollars." Not suprisingly, participation in the program by new judges entering on duty has dramatically diminished. In 1976, 90 percent of our judges were participants in the program; last year only 74 percent were participating. In 1978, 74 percent of "entering on duty" or newly appointed judges elected to participate; in each of the last three years, fewer than 25 percent of newly appointed judges have elected to participate. In essence, our new judges are routinely concluding that the program is "a whistle which isn't worth the penny." See Hearings Before the Subcomm. on Courts of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 305-348 (1982).

In addition to the "diminution" in annuity amounts in relation to purchasing power of the dollar, and the resulting unattractiveness of the program as an investment — which could ultimately result in the bankruptcy of the program — our judges have also long been concerned about the prolonged period of years of service needed to achieve annuity amounts which are realistically adequate. Many judges believe that a minimum "floor annuity," and a more "accelerated" schedule of benefit amounts, are essential to making the program an attractive investment. The draft proposal now before you fully responds to those concerns, and several others.

Section 2 of the draft bill: (1) increases the judges' contribution rate — the percentage of salary which judges must invest each year; (2) reforms the government "matching contribution" arrangement; (3) frees children's annuities from their currently "frozen" condition; (4) modernizes the existing provision requiring surviving spouses to forfeit their annuity in the event they choose to remarry; (5) revises the annuity computation formula to provide the accelerated schedule of benefit payments deemed by many judges to be essential to an attractive program by many judges; (6) authorizes a fair minimum "floor annuity"; and (7) permits the Deputy Director of the Administrative Office to elect to participate in the program. Those seven modifications, which constitute all of the proposed substantive amendments to the codified statute contained in the draft bill, are conveniently reviewable if grouped into three categories of amendments.

Amendments to Reform Annuity Amounts

Four proposed amendments effect reforms which would yield larger annuity amounts. One reform will increase annuities paid to surviving children; the other three reforms will increase annuity amounts received by surviving spouses.

Surviving Children's Annuities

At present under subsection (h)(1) of 28 U.S.C. § 376 annuities are authorized for surviving children in two "classes" and annuity amounts are determined by statutorily designated dollar figures. If the judge's spouse is receiving a survivor's annuity under the program, each child shall receive an annuity of \$1,548 or \$4,644 divided by the number of children, whichever is smallest. If the judge's spouse is not receiving an annuity under the program, each child shall receive an annuity of \$1,860 or \$5,580 divided by the number of children, or the amount which a surviving spouse would have received divided by the number of children, whichever amount is smallest. If there are more than three children who survive a judge in the first class, each will receive less than \$129.00 each month; if there are more than three in the second class, each will receive less than \$155.00 each month. Two basic faults are in need of correction:

1. Statutorily designated amounts become increasingly inadequate as time passes; and
2. Whatever "formula" is substituted for designated amounts should provide reasonable adjustments in annuity amounts in relation to changing economic conditions.

The amendments contained in the draft bill will (1) eliminate statutorily designated amounts by substituting a "formula," consisting of a stipulated percentage of the "high-three-year average annual salary" figure (which is used as the basis for computation of spousal annuities), and (2) set that percentage high enough to insure a reasonable annuity amount. See the draft bill at page 3, lines 8-25.

For children in the first "class" — cases in which a surviving spouse is receiving an annuity — each child would receive either an annuity equal to 10 percent of the high-three-year figure or an amount equal to 20 percent of that figure divided by the number of children, whichever is smaller. When today's salaries have been paid for three years, the 10 percent figure would be \$7,600 for children of district judges and \$8,040 for those of circuit judges (\$633 per month and \$670 per month).

For children in the second "class" — cases in which a surviving spouse is not receiving an annuity — each child would receive an annuity equivalent to 20 percent of the high-three-year figure, or an amount equal to 40 percent of that figure divided by the number of children, or the amount which a surviving spouse would have received divided by the number of children, whichever is smaller. When today's salaries have been paid for three years, the 20 percent figure would be \$15,200 for children of district judges and \$16,080 for those of circuit judges (\$1,267 per month and \$1,340 per month).

Surviving Spousal Annuities

At present under subsection (1) of 28 U.S.C. § 376, a surviving spouse's annuity is usually a direct product of the following formula:

$$\left(\begin{array}{l} \text{high three year} \\ \text{average annual salary} \end{array} \right) \times \left(\begin{array}{l} \text{years of} \\ \text{service} \end{array} \right) \times .0125 = \left(\begin{array}{l} \text{annuity} \\ \text{amount} \end{array} \right)$$

Senate Report 94-799 presents a full explanation of the application of that formula, and the manner in which different types of creditable service are used in its application, at pages 32-34. While an annuity amount "ceiling" of 40 percent of the "average annual salary" figure is statutorily mandated, no "floor" figure is authorized.

Given the .0125 formula factor that 40 percent ceiling figure is reached after 32 years of service ($.40 \div .0125 = 32$). Therefore all contributions made following the thirty-second year of service are purchasing no additional "benefit." While very few judges serve for more than 32 years, that reality actually mitigates toward establishing an even "higher" ceiling — of perhaps 50 percent to 60 percent of the "average annual" salary figure — because the benefit in the few cases would far exceed additional costs to the program.

1. Increasing the "ceiling" for spousal annuities

In 1976, when Congress last approved an "increase" in the JSAS program "ceiling," extending the percentage of salary limitation from 37.5 to 40 percent, that change was firmly predicated upon a direct correlation to the "ceiling" then impacting Members of Congress under the Civil Service Retirement program. See Sen. Rep. No. 94-799, at 47-48. The effect of the 1976 reform was one-dimensional; simply stated two more years of service became creditable for annuity computation purposes. Increasing the ceiling percentage further — if that is the only change made — will still have exactly the same consequence; more years of service will be creditable. If the ceiling is set at 55 percent, service through 44 years will become creditable under the program as it exists today. Realistically very few judges would ever be able to benefit from the change because few would serve the additional number of years. If the computation formula percentage factor is adjusted from the existing .0125 to .0150 (see discussion at item 3, *infra*), however, retention of a 40 percent ceiling would result in the elimination of six years of service from creditability. The draft bill therefore includes an amendment which would substitute a 55 percent ceiling for the existing 40 percent ceiling. See the enclosed draft bill at page 4, lines 10 through 18.

2. Establishing a "floor" for spousal annuities

As noted above, the present program does not have a "floor" annuity amount. Many judges believe the establishment of one to be the most needed reform in the program. Given the problems associated with statutorily designated dollar amounts (increasing inadequacy as time passes and dependency upon legislative enactment for remedial action), the obviously desirable method for providing a floor is the same method used for setting a ceiling — a designated percentage of the the average annual salary amount. Suggested percentages considered by the Judicial Conference ranged from 20 to 30 percent. The effect is once again perceived not only in terms of dollar amounts, but

also in terms of years of service. If a floor is established in the present program at 20 percent, the amount will be equal to the computation-formula amount earned upon completion of 16 years of creditable service; if 30 percent, the equivalency reaches to 24 years. Because the "floor" thus becomes the "guaranteed minimal amount," the greater the percentage, the greater the number of annuities which will be conferred at that level, and the greater the cost to the program in actuarial terms.

Potential cost notwithstanding, the Judicial Conference recommends establishment of a 30 percent "floor," and the draft bill would establish that floor. See page 4, lines 10-19. Inadequate annuity amounts for survivors whose spouses die in the early years of judicial service constitute a problem very much in need of a remedy. When judges endure the consequences of salary "compression," the only way to exempt surviving spouses from experiencing a life-long consequence of that compression is to establish a reasonable minimum annuity amount — and the total potential cost of doing so is well below the cost of salary increases which have already been "suspended" or "delayed."

3. Modification of the computation formula percentage factor

Because the one element in the computation formula which has the greatest direct influence upon year-by-year increases in annuity amounts — which most directly confers a "premium" or "reward" for each year of service — is the abstract percentage factor, increasing that factor from .0125 to perhaps .0150 or .0200 would be the most effective way to realize more adequate annuity amounts and directly recognize both a judge's service and his or her participation in the program. The value of that reform in terms of a structure which rewards each additional year of service is obvious. The Judicial Conference has therefore recommended increasing the percentage factor from .0125 to .0150, and the draft bill would do so. See page 4, lines 5-6.

Amendments to Preserve the Program's Financial Integrity

The four amendments to increase annuity amounts inevitably have direct financial consequences. Just as benefit amounts vary depending upon the combination of reforms, so too do the costs to the program. As the costs increase, income must increase to compensate the investment fund. Actuarial evaluations have been conducted by the Judicial Conference to assess the "percentage of salary" necessary to keep the investment fund actuarially sound.

At present judges who elect to join the program contribute 4.5 percent of their salaries, and the government "matches" their contributions (See 28 U.S.C. § 376(c)). Fund earnings, plus the two types of contributions, constitute the program's sources of income. Actuarial studies indicate that the combined 4.5 percent plus 4.5 percent "contribution rate" very slightly exceeds the 8.58 percent rate necessary to preserve actuarial soundness. Assessments of the potential costs of adding reforms to increase benefit amounts varied from 12.16 percent to 16.72 percent. The first figure would result if a .0150 computation formula factor, a 25 percent floor, and a 50 percent ceiling were created. The second figure would result if a .0200 computation formula factor, a 10 percent floor, and a 60 percent ceiling were created. The following chart graphically portrays the costs of specific "benefit packages" as well as the annual dollar figures for varying contribution percentages for district and circuit judges at presently authorized salary rates:

Formula Factor	Floor	Ceiling	Total Cost		Annual cost assuming an equal rate of contribution by each judge and government	
			Percent of Salary	Contribution Rate	District Judge	Circuit Judge
*.0125 -	0 -	.40	8.58	4.5	3,420.00	3,618.00
				5.0	3,800.00	4,020.00
				5.5	4,180.00	4,422.00
				6.0	4,560.00	4,824.00
.0150 -	.25 -	.50	12.16	6.5	4,940.00	5,226.00
.0150 -	.25 -	.55	12.55	6.5	4,940.00	5,226.00
.0150 -	.30 -	.50	12.77	6.5	4,940.00	5,226.00
.0150 -	.30 -	.55	13.15	7.0	5,320.00	5,628.00
.0200 -	.15 -	.50	14.19	7.5	5,700.00	6,030.00
.0200 -	.20 -	.50	14.33	7.5	5,700.00	6,030.00
.0200 -	.25 -	.50	14.55	7.5	5,700.00	6,030.00
.0200 -	.25 -	.55	15.57	8.0	6,080.00	6,432.00
.0200 -	.30 -	.50	14.88	7.5	5,700.00	6,030.00
.0200 -	.30 -	.55	15.90	8.0	6,080.00	6,432.00
.0200 -	.40 -	.60	16.72	8.5	6,460.00	6,834.00
.0200 -	.50 -	.80	19.70	10.0	7,600.00	8,040.00

* Existing statutory formula.

The "benefit package" incorporated in the draft bill — a .0150 computation factor, a .30 "floor," and a .55 ceiling — is actuarially estimated to require annual funding equivalent to 13.16 percent of salary. If the existing "matching" contribution arrangement were preserved, both judges and the government would have to pay between 6.5 and 7.0 percent of salary per year to adequately fund the reformed program. Given the present level of judicial salaries, the Judicial Conference concluded that a modification of the "matching" contribution arrangement would be appropriate. The Conference concluded that slightly increasing judges' contributions and seeking necessary remaining funding from general appropriations would be a justifiable change in the program — and fortunately an easy method exists for doing that.

On November 4, 1978 the President approved Public Law 95-595 (92 Stat. 2541) which, *inter alia*, created a statutory obligation upon the Administrative Office of the United States Courts to file annually a complete actuarial report on the Judicial Survivors' Annuities program with both the Comptroller General and Congress. The first such report was filed in 1980. Because compliance with the new reporting requirement conveniently provides a regular assessment of the program's actuarial condition, that requirement will easily lend itself to use as the "yardstick" by which the amounts in excess of those contributed by participating judges and investment earnings can be measured on an annual basis. The Judicial Conference has therefore recommended that judges commence contributing 5.0 percent of salary instead of 4.5 percent, as of the effective date of the legislation, and that the government contribute, in lieu of a statutorily established "matching amount," that amount identified as necessary to maintain the actuarial integrity of the program in accordance with each annual actuarial study. Provisions in the draft bill will effect that arrangement. See page 2, line 5

through page 3, line 7. Under the actuarial studies completed for the Conference, the government contribution is estimated to be 8.16 percent for the "benefit package" incorporated into the bill.

Amendments to Adjust Eligibility Standards

When the 1976 Reform Act was processed, the period of participation in the program in marital status required as a precondition to establishing eligibility for a spousal survivor's annuity was reduced from two years to one year. That modification was a direct result of a similar reduction in the same eligibility period under the Civil Service Retirement statute. See 1976 Senate Report at 42. At the time the cost for the change was estimated to be inconsequential. See 1976 Senate Report at 69. Within two years after enactment of the 1976 Reform Act, Congress revised both the Social Security and Civil Service Retirement program criteria to permit widowed annuitants who had attained age 60 to remarry and retain their survivors' benefits under those two programs. See Pub. L. No. 95-216 and Pub. L. No. 95-318. Prior to those changes, widows who remarried lost their benefits, regardless of age at the time of the remarriage, just as do widows and widowers under the Judicial Survivors' Annuity statute today. See 28 U.S.C. § 375(h)(2). Several judicial widows have expressed their belief that a comparable change should be made in their program. The Judicial Conference assessed the cost of revising 28 U.S.C. § 376 to permit retention of annuity benefits if remarriage were to occur after age 60. The estimated cost was again, as in 1976, found to be inconsequential. The Judicial Conference has recommended that the revision be made, and the draft bill would achieve that reform. See page 4, lines 1-3. Just last year, however, Congress again revised provisions in the Social Security and Civil Service Retirement programs, reducing the age 60 criteria to age 55. Act of Nov. 8, 1984, Pub. L. No. 98-615, 98 Stat. 3195. The Conference would recommend that the same age criteria be established for the Judicial Survivors' Annuity program.

Finally, the draft bill would permit a Deputy Director of the Administrative Office to elect to participate in the program under the same arrangement which presently permits the Director to do so. See page 4, lines 20-23.

Section three of the draft bill will not substantively amend 28 U.S.C. § 376; it will, however, expressly authorize full retention of earned creditable service by present program participants without assessing additional costs for the derived benefit. When Congress approved the 1976 Reform Act, an authorization was deliberately included to permit judges then participating to "carry over" into the reformed program those years of creditable service already accumulated — without requiring any additional contribution to cover the cost of the enhanced benefits. See Section 6 of Pub. L. No. 94-554. In other words, a judge "carrying over" could apply his or her years of service at the pre-existing 3 percent contribution rate in application of an annuity computation formula correlated to the new 4.5 percent contribution rate. The "short fall" to the fund was simply absorbed by the fund. As noted, *supra*, there is today a "margin of safety" outstanding in the fund (the difference between the 9 percent total contribution income rate and the actuarially necessary 8.58 "sustaining rate") and actuarial studies indicate that that "margin" can be relied upon to absorb the cost of again providing express statutory authority for a "carry over" of creditable service. Section three of the draft bill simply duplicates the authorization contained in the 1976 Reform Act.

Section four of the bill authorizes an "open season" of 180 days following the legislation's effective date during which any existing program participant who wishes to leave the program may do so without penalty. In approving the 1976 Reform Act Congress also expressly provided a period of 180 days during which judges could choose to "carry over" into the reformed program or withdraw from the old program and receive a

complete refund of contributions plus interest. See Section 7 of Pub. L. No. 94-554. Recognizing that individual judges might not wish to continue participating at higher contribution rates, Congress permitted them to fully withdraw from the program. Section four duplicates the authorization contained in the 1976 Reform Act.

Section five of the draft bill merely provides an "effective date" for the legislation.

This is one possible substantive amendment not included in pending proposals which several judges would like this subcommittee to consider. Under the statute today, if a judge's spouse predeceases him or her, and there are no children eligible to receive annuities, the judge must nevertheless continue participation in the program. Although, upon the judge's death, accrued but unpaid amounts in interest are conveyed through the judge's estate (28 U.S.C. §§ 376(p) and (q)), the few individual judges who have encountered this problem personally would all have preferred to withdraw from the program. The Conference, through the Administrative Office, would welcome the opportunity to work with this subcommittee to fashion an amendment to provide relief in these rare cases.

H.R. 1471 - JSAS "REMARriage" REFORM

This bill would effect exactly the same "age criteria" reform concerning remarriage by Judicial Survivors' annuitants — permitting retention of an annuity if remarriage occurs at or after attainment of 60 years of age — as that recommended by the Judicial Conference in its 1961 proposal and embodied in the presently pending draft bill (page 4,, lines 1-3). Senator D'Amato introduced a similar bill, S. 1063, on May 2. As previously noted, the Judicial Conference would recommend establishing the age criteria at 55 years of age, thus rendering the judicial program comparable in this regard to equivalent survivors program provisions.

H.R. 2446 - Removal Jurisdiction

This bill would amend 28 U.S.C. § 1441 to permit a civil action brought in a State court of which the Federal district courts have exclusive — as distinguished from concurrent — original jurisdiction, to be removed by the defendant or defendants to the appropriate Federal district court. The Judicial Conference's Committee on Court Administration will evaluate H.R. 2446 this week. The Subcommittee on Federal Jurisdiction of the Committee on Court Administration has already recommended that the Conference support the substance of the bill. While anticipating events within the policy-making machinery of the Judicial Conference may be hazardous, the Committee on Court Administration probably will agree in its two-day meeting beginning tomorrow, and the Judicial Conference probably will concur in September. The Administrative Office will keep this Subcommittee advised of any changes in the views expressed here.

The purpose of H.R. 2446 is to abolish the present judicial rule that an improvidently brought State civil action, the subject matter of which is within the exclusive jurisdiction of a Federal district court, must be dismissed when it is removed to the district court by the defendant under 28 U.S.C. § 1441. The theory underlying the rule is that removal confers only "derivative jurisdiction" on the Federal courts; therefore, since the State court lacked subject matter jurisdiction of the civil action, the Federal court cannot acquire subject matter jurisdiction by removal. The doctrine dates back to Lambert Run Coal Co. v. Baltimore and Ohio Rail Co., 258 U.S. 377, 382 (1922), and has been reconfirmed as recently as Franchise Tax Board of California v. Construction Laborers Vacation Trust, 463 U.S. 1, 24 note 27 (1983).

Whatever conceptual legal symmetry the derivative jurisdiction rule may represent, it has no practical benefits — and has been broadly criticized by recognized experts on the subject. See Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* §§ 3721 and 3722 (1985); Moore's *Federal Practice* ¶ 6.157 [3.-2] (2d ed.,

1985). At a minimum, application of the rule means that a plaintiff must assume the added burden of commencing a new civil action in the Federal district court. Even worse, time limitations or other problems may prevent commencement of a new Federal action altogether — even though the action erroneously filed in State court gave timely notice of the claim. The conclusion of Judges on the Federal Jurisdiction Subcommittee is that a State action otherwise properly removed to a Federal court under 28 U.S.C. § 1441 should not be dismissed on the ground that the subject matter of the claim was a matter solely within the jurisdiction of the Federal courts.

While we agree with abolition of the derivative jurisdiction doctrine as proposed in H.R. 2446, a more concise drafting approach, which we offer for your consideration, consists of modifying existing 28 U.S.C. § 1441(a) by inserting the underlined language as follows:

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, exclusive or concurrent, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

This version not only is shorter, but also has the advantage of making it clear that the amendment addresses only questions of subject matter jurisdiction and not questions of personal jurisdiction.

H.R. 3049 - JUDICIAL REVIEW OF FEDERAL MARITIME COMMISSION ORDERS

H.R. 3049 would amend 28 U.S.C. § 2342 to provide for judicial review of certain orders of the Federal Maritime Commission and the Maritime Administration in the United States Courts of Appeals. This proposal was only introduced by Congressman Rodino on July 18, 1985, and has therefore not been evaluated by any units of the Judicial Conference. Our comments, although based upon existing general Conference policy positions, are therefore somewhat tentative, pending an opportunity for a more detailed analysis and review within the Conference structure.

The purpose of this legislation appears to be primarily directed at clarifying the intended impact of the Shipping Act of 1984 (46 U.S.C. § 1701 et seq.) on judicial review of orders issued by the Federal Maritime Commission and the Maritime Administration. Prior to, and continuing after, enactment of the Shipping Act of 1984, 28 U.S.C. § 2342(3) provided that the United States courts of appeals had exclusive jurisdiction to enjoin, set aside, suspend, or to determine the validity of —

such final orders of the Federal Maritime Commission or the Maritime Administration entered under chapter 23 [Shipping Act of 1916] and 23A [Intercoastal Shipping Act of 1933] of title 46 as are subject to judicial review under section 830 [section 31 of the Shipping Act of 1916] of title 46.

Under this provision prior to the 1984 Act, all orders of the Federal Maritime Commission and the Maritime Administration were reviewable only in the courts of appeals, except orders issued under section 19 of the Merchant Marine Act of 1920 (46 U.S.C. § 876). The Shipping Act of 1984, in effect, took part of the subject matter regulated under the Shipping Act of 1916 (foreign commerce) and shifted it to a new regulatory scheme. The 1984 Act, however, failed to expressly provide for judicial review of most of the Federal Maritime Commission orders under that Act. The 1984 Act did provide for review under "chapter 158 of title 28, United States Code" (review of orders of Federal agencies) of Commission orders assessing civil penalties. Since review of agency orders in the United States courts of appeals is available only pursuant to specific authority, the result would be that review of orders under the 1984 Act, other than those assessing civil penalties, could be had only in the Federal district courts pursuant to 5 U.S.C. §§ 702-704 and 28 U.S.C. § 1331. Nothing in the legislative history of the 1984 Act focuses on this result as being intended by Congress.

This history suggests that Congress inadvertently failed to make conforming amendments to title 28 of the United States Code necessary to continue court of appeals review of the subject matter excised from the 1916 Act and restructured in a separate

statute.

It is probable that Congress intended court of appeals review of the subject matter regulated under then existing statutes to continue as in the past. H.R. 3049 is drafted to accomplish this purpose. As previously noted, prior to the 1984 Act the only orders of the Commission not subject to direct review in the courts of appeals were orders issued under section 19 of the Merchant Marine Act of 1920. H.R. 3049 would also extend court of appeals review to orders under this Act.

While the Conference has consistently recommended that Congress evaluate with care all new proposals for "leapfrogging" district court review of final agency determinations, this bill does not appear to effect a dramatic change. In general, "agency appeals" frequently require examination of factual determinations as well as "questions of law." In general, therefore, the Conference has recommended that there is great merit in district court review. District judges routinely supervise the litigation of factual issues. Our courts of appeals are now far too heavily burdened, and most proposals for direct access to them from final agency determinations have, in recent years, entailed prospects for significant caseload increases. In this instance, however, there is no discernable threat of increases in caseload, and probable merit in conforming the forum for review of Federal Maritime Commission orders.

**H.R. 2724 - FEES AND COSTS IN THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA**

This bill would amend section 1914 of title 28, United States Code, to bring filing fees charged in the United States District Court for the District of Columbia into line with all other Federal district courts. The Judicial Conference supports enactment of this legislation.

When title 28 was recodified in 1948, subsection 1914(d) of title 28, United States Code, was designed to exempt the District of Columbia from the filing and miscellaneous fees established for all other Federal district courts in order to preserve the existing fees and costs prescribed by section 11-1509 of the District of Columbia Code, 1940 ed. The District of Columbia Court Reorganization Act of 1970 left in force and effect the fees and changes previously set forth for the United States District Court for the District of Columbia.

In 1976 the Judicial Conference, upon recommendation of the United States district judges for the District of Columbia, approved a recommendation to allow fees and costs in the District of Columbia court to be established and collected in the same manner as they are in other district courts, and authorized the Director of the Administrative Office to transmit proposed legislation to Congress to accomplish this goal.

In 1978 section 1914 of title 28, United States Code, was amended by section 244 of the Bankruptcy Reform Act to increase the amount of the filing fee in district courts generally from \$15 to \$60. No action, however, was then taken to remove the Federal District Court for the District of Columbia from the schedule of fees and costs set forth in the District of Columbia Code.

In 1980 the Judicial Conference reaffirmed its recommendation that the District of Columbia court's fees and costs be brought into line with those of all other district courts. The Judicial Conference perceives no logical reason not to treat the District of Columbia court the same as the other district courts in this respect.

H.R. 2724 would simply repeal paragraph (d) of 28 U.S.C. § 1914, which now requires that the District Court for the District of Columbia be treated differently in that the section "shall not apply to the District of Columbia." Accordingly, the Judicial

Conference would support enactment of this legislation and would welcome the opportunity to work with the staff of the subcommittee on any other changes which might be necessitated in the D.C. Code by passage of this bill.

H.R. 2187 - JUDGES "COMMUTING" EXPENSES

This bill would, for the first time, create legal authority to pay out of the appropriated funds of the Judiciary the commuting expenses of certain justices and judges of the United States between their residences and their official duty stations.

In general appropriated funds are not available to defray, or reimburse Federal officers and employees for travel expenses incurred in their daily commuting from home to work. The Comptroller General of the United States has consistently adhered to the position that, in the absence of specific statutory authority to pay such expenses from appropriated funds, the expense of placing oneself at one's designated official station is inherently a personal expense of the officer or employee. This bill would provide the requisite statutory authority to create an exception to this general principle in the case of Supreme Court justices and Federal judges who hold office during good behavior.

The bill would accomplish its announced purpose by adding a new subsection (h) to section 456 of title 28, United States Code. Section 456 describes the entitlement of justices and Article III judges to be paid their necessary transportation and subsistence expenses incurred in travel to attend court or transact official business at a place other than their official duty stations. Such expenses are paid by the Director of the Administrative Office of the United States Courts, out of judicial appropriations, under his authority in 28 U.S.C. § 604(a)(7) to regulate and pay necessary official travel expenses of judges and court employees. Besides Supreme Court justices, the authority

of section 456 applies to United States circuit judges, United States district judges, and judges of the United States Court of International Trade. Retired justices and senior judges who volunteer to perform continued judicial duties by designation and assignment are also entitled to be paid their official travel expenses under this authority.

New section 456(h), as enacted by H.R. 2187, would authorize the Director of the Administrative Office to pay the actual transportation expenses incurred for travel between abode and official duty station by each justice or judge, whose actual abode, where he or she customarily lives, is not more than 300 miles from his or her official duty station. The term, "official duty station," is presently defined by section 456 as the geographical point of commencement and termination for purpose of computing official travel expenses. In the case of Supreme Court justices, that station is, of course, Washington, D.C. In the case of active circuit and district judges, it is that place where a court of appeals or district court holds regular sessions at which the judge performs a substantial portion of his judicial work, which is nearest the place where he maintains the actual abode in which he customarily lives. Under 28 U.S.C. §§ 44(C) and 134(b), each circuit and district judge is required during his active service to reside in the circuit or district, respectively, for which he is appointed. Upon retirement to senior status, 28 U.S.C. § 374 relieves a judge of restriction as to residence and provides that the place where the judge maintains the actual abode in which he customarily lives shall be deemed his official station for purposes of 28 U.S.C. § 456.

The Judicial Conference of the United States has not had an opportunity to consider H.R. 2187 and official formulate any opinion or recommendation upon it. Realistically, however, in the case of active judges, the commuting distance will ordinarily be relatively short because of the manner in which section 456 presently defines the judges' official duty station with reference to the place of holding court nearest their customary abode. Perhaps arguments supporting the payment of judges

commuting expenses, as distinguished from those of Federal officials generally, might be persuasive, not only because of the relatively small number of judges, but also because they do not have any prescribed tour of duty and are literally always on call on account of the nature of their judicial business. Federal judges are also frequently recruited in mid-career from the private sector, and therefore do not always have the ready opportunity to locate themselves conveniently to their place of work — particularly because they may not be able to foresee, even at the time of appointment, where the geographical balance of the court's judicial business will require them to be located for ready access to the place of holding court where their services will be needed in the interest of efficient administration. In this regard, however, the circuit judicial councils have authority under 28 U.S.C. § 134(e) to declare that the public interest requires a United States district judge to maintain his abode at or near a particular place of holding court and, if the district judges are unable to agree on which of them shall maintain his abode at that place, to determine which of them shall do so.

While it is impossible to estimate the potential cost of enactment of H.R. 2187 with precision, if each existing judge in active service were to travel 10 miles from his or her "abode" or residence to official duty station and back, in his or her personal vehicle, at today's "mileage rate" of 20.5 cents per mile, the resulting cost would be \$4.10 per judge per day. If paid for only 220 working days a year, the annual cost for 721 judges would be approximately \$650,000.

H.R. 2561 - REIMBURSEMENT FOR OFFICIAL TRAVEL COSTS

H.R. 2561 would amend 28 U.S.C. § 456, with respect to the travel expenses of justices and judges, to authorize the Director of the Administrative Office to pay the actual expenses of subsistence incurred by such judges in travel to attend court or transact other official business away from their official duty stations.

Section 456, as previously noted, establishes the statutory mechanism for the regulation and payment of travel expenses incurred by justices and judges, under the authority of the Director as provided at 28 U.S.C. § 604(a)(7). Thus the Director has the same regulatory authority over travel by judges and court employees that the Administrator of General Services exercises as to the executive branch of the government. This authority of the Director with respect to the judiciary is explicitly recognized in the general travel provisions at 5 U.S.C. § 5707(a). Section 456 applies specifically to Supreme Court justices and to judges of the United States, defined by 28 U.S.C. § 451 to mean those judges entitled to hold office during good behavior.

With respect to justices and Article III judges, section 456 now provides that the Director shall pay all necessary transportation expenses certified by the traveler and, for subsistence, either (1) a per diem allowance at a rate fixed by the Director not to exceed the maximum per diem allowance authorized by 5 U.S.C. § 5702(a) for government travelers generally or (2) reimbursement for actual and necessary expenses of subsistence as authorized by the Director's regulations not to exceed the maximum amount fixed for that purpose by 5 U.S.C. § 5702. Section 5702 now limits per diem allowances for travel inside the continental United States to \$56 per day and further imposes a statutory daily limitation of \$75 upon the reimbursement of employees for actual and necessary expenses of subsistence while traveling within the continental United States. Section 5702(e) explicitly provides that this section does not apply to a justice or judge except to the extent that it is incorporated by reference in 28 U.S.C. § 456.

The amendment that would be made to section 456 by H.R. 2561 would remove from that section the existing limitation that the Director may reimburse actual and necessary subsistence expenses only up to the statutory ceiling of \$75 per day presently fixed by 5 U.S.C. § 5702 for general government travel. Instead it would amend section 456 to authorize, in addition to all necessary transportation expenses, the payment of

"actual and necessary expenses of subsistence actually incurred, notwithstanding the provisions of section 5702 of title 5. . . ." This bill would further require the Director, in determining necessary expenses, to take into account costs of transportation and subsistence generally incurred for travel to the same geographical area.

Section 456(a) already empowers the Director of the Administrative Office to pay actual and necessary subsistence expenses without reference to the \$75 limitation of 5 U.S.C. § 5702 for justices and judges travelling to conduct business under a designation and assignment authorized by chapter 13 of title 28, United States Code, which exceeds in duration a continuous period of 30 calendar days. Chapter 13 is the source of statutory authority for United States circuit and district judges to be designated to sit temporarily on other courts of their own circuit or of the other judicial circuits throughout the United States. At 28 U.S.C. § 294 this chapter further authorizes retired Supreme Court justices and senior circuit or district judges to be designated and assigned to perform judicial duties in retirement in their own or other circuits when the need for their services exists and they are willing and able to do so.

Thus H.R. 2561 would change existing law by extending the present legal authority to reimburse justices and judges for subsistence expenses actually incurred to all situations necessitating judicial travel on official business, removing the present limitation that confines this authority to travel on judicial designation and assignment to another court exceeding 30 continuous days.

Since this bill was only recently introduced, it has not yet been considered by the Judicial Conference of the United States and there is no official position upon it on behalf of the judiciary at this time.

H.R. 3844 - AMENDING SECTION 455 OF TITLE 28, UNITED STATES CODE

This bill, only introduced on July 18, has not yet been examined by any unit within the Judicial Conference's policy formulation structure. It would remedy a specific problem which has arisen as a consequence of existing disqualification requirements and their application in class action cases. Today, under section 455 of Title 28, United States Code, a judge must "disqualify" himself or herself in any case in which he or she — or members of his or her family — are parties to the case or have a financial interest in a party to the case. In most cases determining whether a financial interest cognizable under the statute exists is not difficult. In complex multi-district class action cases, however, a full list of all members of a class may not become available until long after litigation has commenced, and a judge will be unable to determine whether a cognizable interest exists then. When that happens now, a new judge must be appointed, an event which disrupts the efficient administration of the case and can be very costly to litigants.

In his introductory remarks on July 18 the Chairman of this subcommittee cited, as an example of the problem, the case of In re Cement and Concrete Antitrust Litigation, 515 F. Supp. 1076 (D Ariz. 1981). Because the judge's wife owned stock in 7 of 210,000 "class members," with a financial interest estimated at \$4.23 to \$29.70, the judge had to step out of the case in its sixth year, after having entered 75 pretrial orders. Obviously corrective amendments are desirable.

In September of 1980 the Judicial Conference approved a proposed amendment to 28 U.S.C. § 455:

(f) Notwithstanding the foregoing provisions, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance, after the matter was assigned to him, of a party in which he individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest (other than an interest that could be substantially affected by the outcome), a waiver of disqualification

may be accepted from the parties; in the absence of waiver, disqualification is not required if the judge determines that the public interest in avoiding the cost of delay or reassignment outweighs any appearance of impropriety arising from his continuing with the matter to completion.

See Conference Proceedings, Sept. 1980, at 81. Drafted by the Conference's Committee on Codes of Conduct, which is chaired by Chief Judge Howard T. Markey of the Court of Appeals for the Federal Circuit, the corrective proposal has been repeatedly reaffirmed by the Conference since September of 1980. H.R. 3044 will be delivered to Judge Markey tomorrow, at the Court Administration Committee's meeting. The Conference will expedite formulation of an official opinion and convey it to the chairman of this subcommittee as quickly as possible.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTORJOSEPH F. SPANIOLO, JR.
DEPUTY DIRECTOR

August 3, 1981

Honorable Thomas P. O'Neill, Jr.
Speaker of the House
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

On behalf of the Judicial Conference of the United States I am transmitting for consideration by Congress a draft bill which would amend section 376 of title 28, United States Code, the existing statutory authorization for the Judicial Survivors Annuities program. This draft bill would implement modest reforms in that program which the Judicial Conference believes both necessary and in conformity with intentions expressed by Congress when the program was last reformed in 1976.

When Public Law No. 94-544, "The Judicial Survivors' Annuities Reform Act," was approved by the President on October 19, 1976, Congress clearly intended that the new law achieve three fundamental purposes:

- (1) placing the "program in an actuarially sound fiscal condition for the first time since its creation";
- (2) providing "more liberal eligibility standards and reasonable increases in existing annuity amounts, made necessary by increases in the cost of living since each existing annuity was commenced"; and
- (3) establishing "a method for providing future periodic increases in annuity amounts without endangering the fiscal integrity of the entire program."

See S. Rep. No. 94-799, 94th Cong., 2d Sess. (1976). While Congress achieved the first two purposes upon enactment, realization of the third purpose has not been achieved -- because Congress has not acted as it presumed it would act to adjust judicial salaries annually.

One year before enactment of the 1976 Reform Act, Congress passed legislation authorizing annual "comparability adjustments" in federal judicial salaries, to be determined by the same formula then used to annually increase rates of pay for federal employees under the General Schedule. Act of August 9, 1975, Pub. L. No. 94-82, Title II, §205, 89 Stat. 422. When structuring provisions in the 1976 Reform Act, the

Honorable Thomas P. O'Neill, Jr.
page two

Senate Judiciary Committee presumed that the regular annual impact of those salary increases would insure "future periodic increases in annuity amounts." See 1976 Senate Report at 46 and 55-56. The basic presumption was that, as judicial salaries were adjusted annually, survivors' annuities would also be annually increased. (See 28 U.S.C. §376(m)). Commencing in the year in which the Reform Act was passed, however, Congress acted to "prohibit" payment of annual comparability increases. Consequently annuity amounts began "falling behind" almost as soon as the 1976 Reform Act became effective.

In addition to the "diminution" in annuity amounts resulting from salary "compression," Judges have long been concerned about the prolonged period of years of service needed to achieve annuity amounts which would be realistic in relation to an inflationary economy. Consequently many judges have recommended both a statutory authorization for a minimum "floor annuity" and an "accelerated" increase in amounts from one year to the next. Finally, judges have consistently expressed concern about the statutorily established "frozen" amounts of surviving children's annuities under subsection (h) of 28 U.S.C. §376.

In response to that range of problems, the Judicial Conference's Committee on the Judicial Branch, working with actuarial analyses prepared by the Martin E. Segal Company of New York City, studied a spectrum of proposed amendments to 28 U.S.C. §376 to remedy those problems and evaluated possible answers to the unavoidable question: "How will the cost of improvements be financed?" At its July 13-14 meeting the committee made a series of decisions related to a spectrum of proposed amendments to 28 U.S.C. §376 and the implementation of those amendments. The enclosed draft bill embodies the policy determinations made by the committee. On July 31 the Judicial Conference's Executive Committee, which is authorized to act on behalf of the Conference when the Conference is not in session, unanimously approved the enclosed draft bill and directed me to immediately forward it to Congress for consideration.

Representatives of the Judicial Conference and Administrative Office personnel will provide whatever assistance the Congress may request in reviewing this proposal.

Sincerely yours,

William E. Foley
William E. Foley
Director

Enclosure

97th CONGRESS
1st Session

H.R. _____

IN THE HOUSE OF REPRESENTATIVES

_____, 1981

Mr. _____ (by request) introduced the following bill; which
was read twice and referred to the Committee on the Judiciary

A BILL

To amend section 376 of title 28, United States Code, in order to
reform and improve the existing program for annuities for survivors
of Federal Justices and judges.

1 *Be it enacted by the Senate and House of Representatives of the*
2 *United States of America in Congress assembled,* That this Act may be
3 cited as the "Judicial Survivors' Annuities Reform Act of 1981."

4 SEC. 2. (a) Subsections (b) and (d) of section 376 of title 28,
5 United States Code, are amended by striking out "4.5 percent" each
6 place it appears and inserting in lieu thereof "5.0 percent".

7 (b) Subsection (c) of section 376 of title 28, United States Code,
8 is amended by striking the first sentence and inserting in lieu thereof
9 the following: "There shall also be deposited to the credit of the
10 "Judicial Survivors' Annuities Fund," in accordance with such procedures
11 as may be prescribed by the Comptroller General of the United States,

BEST COPY AVAILABLE

1 amounts required to maintain the actuarial balance of the program as
2 such amounts are actuarially determined on an annual basis in accordance
3 with the provisions of Pub. L. 95-595 (31 U.S.C. 668a)."

4 (c) Subsection (h)(1)(B) of section 376 of title 28, United States
5 Code, is amended by striking clauses (i) and (ii) and inserting in lieu
6 thereof:

7 "(i) 10 percent of the average annual salary amount determined
8 in accordance with the provisions of subsection (1) of this
9 section; or

10 "(ii) 20 percent of such average annual salary amount, divided
11 by the number of children;"

12 (d) Subsection (h)(1)(C) of section 376 of title 28, United States
13 Code, is amended by striking clauses (ii) and (iii) and inserting in lieu
14 thereof:

15 "(ii) 20 percent of the average annual salary amount determined
16 in accordance with the provisions of subsection (1) of this section; or

17 "(iii) 40 percent of such average annual salary amount, divided
18 by the number of children;"

19 (e) Subsection (1) of section 376 of title 28, United States Code,
20 is amended:

21 (i) by striking out "1 1/4 percent" and inserting in lieu thereof
22 "1.5 percent"; and

23 (ii) by striking out the existing proviso and inserting in lieu
24 thereof:

25 *Provided*, That such annuity shall not exceed an amount equal

1 to 55 percent of such average annual salary, nor be less than
2 an amount equal to 30 percent of such average annual salary, and
3 that any amount determined in accordance with the provisions of
4 this subsection shall be reduced to the extent required by sub-
5 section (d) of this section, if applicable.

6 (f) Subsection (h)(2) of section 376 of title 28, United States
7 Code, is amended by striking out the period following "remarriage" and
8 adding "prior to the attainment of sixty years of age."

9 (g)(1) Subsection (a)(1)(c) of section 376 of title 28, United States
10 Code, is amended by inserting immediately after the word "Director", the
11 words "or Deputy Director".

12 (2) Subsection (a)(2)(c) of section 376 of title 28, United States
13 Code, is amended by inserting immediately after the word "Director", the
14 words "or Deputy Director".

15 SEC. 3. The benefits conferred by this Act shall immediately become
16 available to any individual becoming eligible for an annuity under
17 section 376 of title 28, United States Code, on or after the date upon
18 which this Act becomes effective. *Provided*, That although the rights of
19 any judicial official electing to come within the purview of section 376
20 of title 28, United States Code, on or after the date upon which this
21 Act becomes effective, shall be determined exclusively under the provi-
22 sions of that section as amended by this Act, nothing in this Act shall
23 be interpreted to cancel, abrogate or diminish any rights to which an
24 individual or his or her survivors may be entitled by virtue of that
25 individual having contributed to the judicial survivors annuity fund

1 before the date upon which this Act becomes effective.

2 SEC. 4. At any time within one hundred and eighty days after the
3 date upon which this Act becomes effective, any judicial official who
4 has been participating in the judicial survivors annuity program created
5 by the Act of October 19, 1976 (90 Stat. 2603) shall be entitled to revoke
6 his or her earlier election to participate in that program and thereby
7 completely withdraw from participation in the program as reformed by this
8 Act: *Provided*, That (a) any such revocation may be effected only by means
9 of a writing filed with the Director of the Administrative Office of the
10 United States Courts, (b) any such writing shall be deemed to have become
11 effective no sooner than the date upon which that writing is received by
12 the Director, (c) upon receipt of such a writing by the Director, any and
13 all rights to survivorship benefits for such judicial official's survivors
14 shall terminate, and all amounts credited to such judicial official's
15 individual account, together with interest at 3 percent per annum, compounded
16 on December 31 of each year to that date of revocation, shall thereafter
17 be returned to that judicial official in a lump-sum refund payment, and
18 (d) any judicial official who effects such a revocation and who subse-
19 quently again becomes eligible and elects to join the judicial survivors
20 annuities program created by this Act under the provisions of section 376
21 of title 28, United States Code, as amended by this Act, shall be permitted
22 to do so only upon the redeposit of the full amount of the refund obtained
23 under this section plus interest at 3 percent per annum, compounded on
24 December 31 of each year from the date of the revocation until the date
25 upon which that amount is redeposited. Any judicial official who fails

1 to effect a revocation in accordance with the right conferred by this
2 section within one hundred and eighty days after the date upon which this
3 Act becomes effective shall be deemed to have irrevocably waived the right
4 to that revocation.

5 SEC. 5. This Act shall become effective on the first day of the
6 third month following the month in which it is enacted, or on October 1,
7 1981, whichever occurs last.

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Mr. KASTENMEIER. Thank you, Judge Clark.

Do you think the conference will be taking a position on H.R. 2187 at its September meeting, or is it on the agenda?

Judge CLARK. I have an indication that it will be on the agenda.

Mr. KASTENMEIER. In terms of whether your actual travel expenses are permitted, how can we be sure Government, let's say, will be getting the best buy and that some of the things which concern the Justice Department might not occur? You have indicated you place great reliance on the last phrase of the bill in terms of "reasonable subsistence," and cost of transportation, whatever those costs may be.

Judge CLARK. Excuse me, Mr. Chairman.

Right now, actual transportation expenses are reimbursed. This is not a change from the present language of the law.

The thing that now restricts judges in a number of different travel areas is this cap of \$75 that was imposed in 1980. It is limited to actual expenses. In other words, if I go to Houston, TX, (strange enough for a big city—but right now there is a hotel room glut in Houston) I can get a room at the Sheraton Hotel in downtown Houston, which is only three blocks from the courthouse, for \$35 a night. So, when I go to Houston, my expenses don't get anywhere near the cap.

The problem is that when I come to Washington, DC, the cheapest hotel room that I can get that I will stay in is \$79 a night, and there is a 10 percent District tax plus \$1 on top of that.

The \$75 cap is gone before I ever bite the first hotdog.

Mr. KASTENMEIER. However, that being the case, if the cap is removed, you could theoretically stay at a \$150 a night room.

Judge CLARK. This is why I would hope you would add the word "reasonable" to it, because, as I say, there is no intent on the part of the judges to stay in a luxury suite or eat at the finest restaurants. I am sure that the director, with all of the surveys such as Runzheimer's and others, is going to be able to make some calculations. I don't know that it is going to make Mr. Mecham the most popular director we ever had, but he can certainly, with the guidance of the Judicial Conference of the United States, set some sort of reasonable limits by taking into account today's expenses.

This is all I am asking you to do, to consider that this is a very valuable bill to modernize this area of the law.

Mr. KASTENMEIER. I note that no one—at least I heard no one—speak of H.R. 3044, revising the disqualification standards.

Judge HUNTER. May I speak to that?

Mr. KASTENMEIER. Of course.

Judge HUNTER. The reason I didn't cover it before is, frankly, the expert in that area is Judge Howard Markey. Judge Markey is not here. I will pinch-hit with just a word or two about that bill.

The bill actually was introduced July 18 of this year, so we haven't had any real opportunity to examine it, either at the committee or the subcommittee level, and certainly not at the Judicial Conference level. On the other hand, the general subject is no stranger to us. We have long recognized the basic problem H.R. 3044 is intended to cure, mainly that the situation where in a very large case the judge finds, after he has been in the case for months

or maybe a year or more, that he or some member of his family has a financial interest in the case.

And in class actions, this is not at all unusual, because you don't even know the names of the people interested in the case or who the ultimate parties are until a substantial period of time has passed. And under the present disqualification wording that judge has to disqualify, and it disrupts the orderly processing of the case, thrusts a new stranger into the case, a new judge into the action, and causes all sorts of mischief as well as unnecessary expense.

It brings up the old phrase that justice delayed is justice denied. It certainly makes that come true.

H.R. 3044 is designed to cure that situation. And while we would like to have more time to look at the exact wording of it, I can safely say that the past approach of the Judicial Conference has been to recognize this precise problem and to hope for a congressional cure of it. Obviously, we will have it on our agenda. Obviously, we will report to your committee as soon as we have an official position on it.

But I think absent something unusual about the particular language, you will find the conference warm towards this bill.

Mr. KASTENMEIER. With respect to the other bill you mentioned, Judge Hunter, originally 2446, it does on the surface make a good deal of sense. But couldn't the bill create the incentive to misfile in State courts? Is that possible?

Judge HUNTER. Well, of course, anything I guess is theoretically possible. But the practical situation is that that shouldn't happen. An intentional wrong filing brings a lot of practical fallout that mitigates against anyone intentionally doing it. You would look bad to your client; you would look foolish to your brother lawyers; you would occasion some delay out of it, which certainly would not get you off to a good start in the litigation generally. I don't believe it would be abused in that respect.

Mr. KASTENMEIER. Judge Coffin, in your detailed statement on judges' survivors' annuity reform, you mentioned prospectively the formula might be followed of judges paying 5 percent, the Federal Government 8.15 percent, or 8.16 percent.

In the event of any effort to change those ratios—for example, to increase the judges' contribution to 5.5 or 6 percent—would such a change cause the judges to withdraw their support?

Judge COFFIN. I would think so, at the moment. But that is with the present salary situation in view.

As Judge Clark said, unrecoverable travel expenses is an add-on, an added insult. If there were adequate compensation in salary, then I would certainly agree that that would not be a stumbling block to increase it to that point.

The justification for putting more of a burden on the Government is that—aside from this background factor I mentioned—is that there is some margin; that is, there is some room in the funding for the Government to bear that because the 5 percent will contribute quite a bit and there will be something left over.

And then, also, as the statement reveals, we do have—the administrative office has to keep track of the performance of this fund. And if it should get in danger of getting out of whack, then that would be time for an increase in the contribution rate. But I would

say that at the moment if we polled the judges and said, OK, the only way you can do this is to pay 6 percent, would you do it?—I think they would say no, we will gamble.

Mr. KASTENMEIER. Judge Williams, could we solve the travel expense problem? You addressed yourself to that, as indeed the conference has. Could it be solved by increasing statutory limits on per diem travel rather than just with allowing recompense for actual expenses only and thereafter adjusting the amount for inflation on some basis? Could that solve the problem of still maintaining a cap?

Judge WILLIAMS. I think it would go a long way to solve it, yes, indeed. The problem is, you would always have to be messing around with it as different areas of the country become more expensive and the inflation factor comes into play. It certainly would be an improvement over what we have now.

But we think that, first of all, the flexibility of the proposed bill would be easier to administer; and second, as I mentioned in my statement, the judges are required by regulation to be very conservative in the use of the expenditure of moneys, as they would in their own business activities.

I think you should depend on judges to be concerned about it and stay within reasonable limits. As mentioned by Judge Clark, certainly if one judge were stepping out of line and being exorbitant, he could be talked to and advised about it. If you increase the limits, that certainly would be a step in the right direction.

Mr. KASTENMEIER. Let me ask you about—you didn't discuss this in your presentation—H.R. 2187, relating to judges' commuting expenses, which Judge Clark dealt with.

Judge, does your association have a position on that?

Judge WILLIAMS. No. I just became familiar with the bill yesterday.

Judge Clark's testimony indicated some problems with it that I would agree with. We all know sometimes you can't get direct increases in compensation; you do it through perks on the side. That would be one way. I am not sure it would stand up to a hard look.

Mr. KASTENMEIER. What about the revision of disqualification standards? Are you familiar with that subject in terms of the bill before this committee?

Judge WILLIAMS. I have not looked at it. I read the bill.

Mr. KASTENMEIER. I would like to encourage the association to take a look at both those two bills, as well as, the structural reform of the four bills. They may concern the Federal Judges Association as well as the matters involving judicial perquisites only.

In any event, if the association is disposed to comment on any of those bills, we would welcome that.

Judge WILLIAMS. I certainly will. And I will get back to you with your position.

Mr. KASTENMEIER. I would like to thank all of you for your appearance here today. We will endeavor to assure that all members of this committee are aware of your remarks and your position of the Judicial Conference and the Judges Association. It is my hope that we may move these matters appropriately forward before too long a period of time.

Obviously, there will be further meetings of your own organizations, and we would not be able to meet before September, but maybe October. So, to the extent that you can further help us with your views and those of your association, I would urge you to do so in the near future.

Thank you, gentlemen.

The last witness today is Mr. Dennis Mullins, Deputy Assistant Attorney General, Office of Legal Policy of the U.S. Department of Justice. He and his office have been very helpful to the subcommittee in the past, and I wish to express our thanks, and I think perhaps of Judge Williams, who you have permitted to precede you with the other judges.

In any event, we have your statement and you may proceed as you wish. We are very pleased to have you here.

TESTIMONY OF DENNIS F. MULLINS, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE

Mr. MULLINS. Thank you, Mr. Chairman.

I am pleased to present the views of the Department of Justice on H.R. 1472 and other bills that incorporate court reform proposals on a variety of subjects, including judicial survivors' annuities, travel expenses of judges, removal jurisdiction, district court fees, and judicial disqualification.

Because we have not been able to study adequately all of these proposals, we will be pleased to submit a supplementary statement relating to the remaining matters raised in these bills as soon as possible.

Mr. KASTENMEIER. As soon as you can get such a statement to us, we will of course be very pleased to have it. [See Appendix II(A).] Thank you.

Mr. MULLINS. I will summarize my testimony at this time.

The first bill in numerical order is H.R. 1472. It would amend the judicial survivors' annuities statute to provide that an annuity payable to the surviving spouse of a judge is not to be terminated by remarriage of the surviving spouse after attaining the age of 60.

The administration has no objection to the enactment of this proposal, but we would suggest that consideration be given to substituting the age of 55 for the age of 60 now in the bill to conform to the change made last year in civil service retirement.

The second bill, H.R. 2187, would direct reimbursement of judges living within 300 miles of their official duty stations for transportation expenses incurred in traveling between their homes and their duty stations.

We oppose enactment of this proposal. The normal arrangement in both public and private employment is that employees bear commuting expenses. In addition, the bill does not limit reimbursement to necessary expenses, to a statutory dollar limit, or to the provisions of regulations issued by the reimbursing authority. It would accordingly be susceptible to abuse.

The third bill, H.R. 2446, would amend title 28 United States Code, section 1441 to provide that a Federal court to which an action is removed from State court is not barred from hearing and

determining a claim because the State court lacked jurisdiction over it. A case law gloss on section 1441 now bars removal to Federal court of a case within the exclusive jurisdiction of the Federal courts, where the case was improperly commenced in State court.

Because this prohibition on removal of such cases involves a wasteful requirement of dismissal and refile, we support in principle the reform proposed in H.R. 2446. We would require some additional time, however, to consider whether there are any technical problems with the formulation of the proposal in the bill and whether any conforming changes are needed in other statutes.

Additional comments will be included in our subsequent statement.

The fourth bill, H.R. 2561, provides generally that judges working away from their official duty stations are to be reimbursed for actual and necessary transportation and subsistence expenses in accordance with regulations to be prescribed by the Administrative Office of the U.S. Courts. It would eliminate the current \$75 per day cap on subsistence expenses applicable to judges on trips of less than 30 days.

To the extent that the Judiciary is inhibited in temporarily assigning judges to other courts or locations by inadequate provision for reimbursement of travel expenses, the policy favoring a mobile nationwide corps of judges, the members of which can be moved freely from one area to another to meet shifting caseloads, is undermined or defeated.

Nevertheless, we would reserve judgment concerning the advisability of this type of change pending development of additional information.

Also, as the administration continues to consider the issue of travel expenses for executive branch personnel, it will consider whether the approach contained in this bill is the most advantageous approach across the board.

The fifth bill, H.R. 2724, would make the fees charged in D.C. District Court the same as the fees charged in other district courts. There is no evident reason why the fees charged in the Federal District Court for the District of Columbia should differ from those charged in the other district courts.

We accordingly have no objection to the enactment of this proposal.

The sixth bill, H.R. 3044, would amend the judicial disqualification statute to avoid disqualification of the judge or invalidation of prior proceedings in class actions when, for example, it appears after class certification that the judge's spouse has some minor interest in the case on account of a relationship to a class member.

As indicated in our comments last year on S. 645, the purpose of the proposed change seems unobjectionable, but some care is required in drafting an amendment to avoid unintended consequences. We would expect to include an analysis of this question in our subsequent statement and would be glad to provide the subcommittee with any desired assistance in the further development of this proposal.

The seventh bill, H.R. 3049, would amend the Hobbs Act to place all judicial review of orders of the Federal Maritime Commission and the Maritime Administration in the Courts of Appeals, rather

than splitting judicial review between the district and circuit courts, as is currently the case.

The subcommittee has received a letter from General Counsel Jim Marquez of the Department of Transportation stating administration support for this measure, with one suggested amendment. The Department agrees that the conservation of judicial resources and the conservation of time of all concerned parties makes this a beneficial change.

We had not received the Department of Transportation's proposed amendment until today. We would be happy to make any comments we may have on it in terms of technical matters or needs for conforming changes in our supplementary statement.

Finally, your invitation to testify included a draft bill amending the annuities system for survivors of Federal judges. As indicated last year in our comments on S. 645, we consider it most appropriate to defer to the judgment of Congress on this matter.

This concludes my statement, Mr. Chairman. I would be most pleased to answer any questions you may have.

[The statement of Mr. Mullins follows:]

STATEMENT OF DENNIS F. MULLINS, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE
OF LEGAL POLICY

Mr. Chairman and Members of the Subcommittee:

I am pleased to present the views of the Department of Justice on H.R. 1472, 2187, 2446, 2561, 2724, and a number of draft bills included with the Committee's invitation to testify. The bills and draft bills incorporate court reform proposals relating to various subjects, including judicial survivors' annuities, travel expenses of judges, removal jurisdiction, district court fees, and judicial disqualification.

Within the time available prior to this hearing, we have not been able to study adequately and develop positions on all of these proposals. In my statement today I will set out the positions and comments we have at this time. We will be pleased to submit a supplementary statement relating to the remaining matters raised in these bills as promptly as possible hereafter.

Our comments on the specific proposals in the package are as follows:

I. H.R. 1472 -- Remarriage by Surviving Annuitants

The first bill, H.R. 1472, would amend the judicial survivors' annuities statute, 28 U.S.C. § 376, to provide that an annuity payable to the surviving spouse of a judge is not to be terminated by remarriage of the surviving spouse after attaining the age of sixty.

This bill is in the nature of a conforming amendment to a change in the Social Security Act, codified as 42 U.S.C. § 402(e)(3), pursuant to which remarriage by a surviving spouse after attaining the age of sixty does not result in the termination of survivor's benefits. More significantly, P.L. 98-615 changed the remarriage age for a surviving spouse under the civil service retirement system to age 55. This change reflects concern for the situation of surviving spouses who are considering marriage at a point in their lives at which neither they nor a potential spouse are likely to have any long-term sources of income other than retirement income, and who might otherwise be forced to choose between refraining from marriage and incurring financial hardship. The corresponding change in the judicial survivors' annuities system proposed in H.R. 1472 presumably rests on the same rationale, and would serve the same purpose. Accordingly, we have no objection to enactment of this proposal, but would suggest that consideration be given to substituting age 55 to conform to civil service retirement.

II. H.R. 2187 -- Payment of Judges' Commuting Expenses

The second bill, H.R. 2187, would direct reimbursement of judges living within three hundred miles of their official duty stations for transportation expenses incurred in traveling between their homes and their duty stations.

We oppose enactment of this proposal. The normal arrangement in both public and private employment is that employees bear their own commuting expenses. We see no reason why a contrary rule should obtain for federal judges.

The formulation of the proposal raises additional concerns. In contrast to the existing provisions authorizing reimbursement of judges for travel while working away from their official duty stations, 28 U.S.C. § 456, the bill does not limit reimbursement to "necessary" expenses, or to a statutory dollar limit, or to the provisions of regulations issued by the reimbursing authority. Taken literally, the bill would require full reimbursement of a judge who decided to commute to work each day by chauffeured limousine or by helicopter.

The bill also requires reimbursement of a retired justice or judge recalled to active duty for transportation expenses incurred in traveling between his abode and his official duty station, subject to a three hundred mile limit. Such expenses cannot be incurred because the official duty station of a retired judge, pursuant to 28 U.S.C. § 374, is his abode.

III. H.R. 2446 -- Removal Jurisdiction Amendment

The third bill, H.R. 2446, would amend 28 U.S.C. § 1441 to provide that a federal court to which an action is removed

from state court is not barred from hearing and determining a claim because the state court lacked jurisdiction over it.

Section 1441 of Title 28 generally provides that defendants may remove to federal court civil cases commenced in state courts over which the federal district courts have original jurisdiction. This rule operates straightforwardly in cases within the concurrent jurisdiction of the state and federal courts. Peculiarly, however, a caselaw gloss on § 1441 bars removal to federal court of a case within the exclusive jurisdiction of the federal courts, which was improperly commenced in state court. If a defendant attempts to remove such a case to a district court, the district court is required to dismiss it. Further proceedings then depend on the plaintiff refiling the case in federal court. 1/

This prohibition on removal under § 1441 of a case over which the state court lacked jurisdiction seems to further no intelligible policy, and it involves a wasteful requirement of dismissal and refiling. We accordingly support in principle the reform proposed in H.R. 2446. We would require some additional

1/ See generally 130 Cong. Rec. E2029-30 (daily ed. May 8, 1985) (sponsor's statement concerning H.R. 2446); C. Wright, The Law of Federal Courts 212 (4th ed. 1983); Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3721 at 195-200 (1985); American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 206-07 (1969).

time, however, to consider whether there are any technical problems with the formulation of the proposal in the bill, and whether any conforming changes are needed in other statutes. Additional comments will be included in our subsequent statement.

IV. H.R. 2561 -- Judges' Travel Expenses

The fourth bill, H.R. 2561, would amend the statute governing reimbursement of travel expenses for judges while working away from their official duty stations, 28 U.S.C. § 456. It provides generally that judges are to be reimbursed for actual and necessary transportation and subsistence expenses incurred in such circumstances, in accordance with regulations prescribed by the Director of the Administrative Office of the Courts with the approval of the Judicial Conference.

Currently, 28 U.S.C. § 456 incorporates a more complicated set of rules for reimbursement of such expenses. It provides for (1) reimbursement of necessary transportation expenses, (2) a per diem allowance or reimbursement for actual and necessary subsistence expenses subject to the dollar limits in the general statute governing travel expenses for federal employees, 5 U.S.C. § 5702, and (3) reimbursement of necessary travel expenses and actual and necessary subsistence expenses while on assignment pursuant to chapter 13 of title 28 for a continuous period of at least thirty days in accordance with

regulations prescribed by the Director of the Administrative Office of the Courts with the approval of the Judicial Conference. The bill would apply across the board the approach now taken in connection with travel expenses incurred on temporary assignments of active judges to other courts and assignments of senior judges, the duration of which is thirty days or longer.

The subject of this bill is obviously of considerable importance to the administration of the federal judiciary, and to parties, including the Department of Justice, that depend on the availability of sufficient judicial manpower to hear and decide cases promptly in the various areas of the country. The general policy reflected in chapter 13 of title 28 is the maintenance of a mobile, nationwide corps of judges the members of which can be moved freely from one area to another to meet shifting caseloads. To the extent that the judiciary is inhibited in temporarily assigning judges to other courts or locations by inadequate provision for reimbursement of travel expenses, this policy is undermined or defeated. Further, this bill causes us to balance the conflict between fairness to judges who must travel and thus incur out-of-pocket expenses, particularly in expensive cities, and the budget impact of increased travel costs, especially considering a specific Congressional desire to reduce travel costs.

We would reserve judgment concerning the advisability of this type of change pending the development of additional

information concerning the scope of the problem to which it is addressed, the likely effect of the proposed change, and the availability of alternative means of meeting the problem. Relevant considerations include: (1) the extent to which existing reimbursement provisions are actually found to provide inadequate levels of reimbursement, (2) the extent to which existing problems of this sort might be met without statutory amendment through the broader application of cost-reduction measures relating to travel expenses that have been undertaken in particular courts or in executive agencies, (3) the increase in overall expenditures on judicial travel that is likely to result from enactment of this proposal, and (4) the possibility of meeting any existing problems in this area by increasing statutory limits on travel expenses, as opposed to making them wholly inapplicable. As the Administration continues to consider the issue of travel expenses for executive branch personnel, it will consider whether the approach contained in this bill is the most advantageous approach across the board.

V. H.R. 2724 -- District Court Fees

The fifth bill, H.R. 2724, would delete subsection (d) of 28 U.S.C. § 1914, which excludes the District Court for the District of Columbia from the general statute governing fees in federal district courts. The effect would be to make the fees charged in the D.C. District Court the same as the fees charged in other district courts.

The exemption of the D.C. District Court from the general fee provision originated in a period preceding the creation of the local court system in the District of Columbia, in which the D.C. District Court was still responsible for cases arising under local D.C. law. Its purpose was to preserve the applicability of fee schedules in the D.C. Code geared to the partially local nature of the caseload of the D.C. District Court. Since local cases are now handled in the District of Columbia courts, there is no evident reason why the fees charged in the federal District Court for the District of Columbia should differ from those charged in other federal district courts. We accordingly have no objection to enactment of this proposal.

VI. Draft Bill -- Judicial Survivors' Annuities

The package accompanying the Committee's invitation to testify included a draft bill amending the annuities system for survivors of federal judges. The proposal is similar to the original version of Title III of S. 645 of the 98th Congress. 2/ As indicated in our comments on S. 645 as reported by the Senate Judiciary Committee Subcommittee on Courts, we consider it most appropriate to defer to the judgment of Congress on this matter. 3/

2/ 129 Cong. Rec. S1947, 1950-51 (daily ed. Mar. 1, 1983).

3/ Letter of Assistant Attorney General Robert A. McConnell to Honorable Strom Thurmond Concerning S. 645, at 3 (Mar. 26, 1984).

VII. Draft Bill -- Judicial Disqualification

The package accompanying the Committee's invitation also contained a draft bill amending the judicial disqualification statute, 28 U.S.C. § 455, which has since been introduced as H.R. 3044. The sponsor's statement indicates that the proposed amendment is addressed to class action suits in which, for example, it appears unexpectedly after class certification that the judge's spouse has some minor interest in the case on account of a relationship to a class member. 4/ The purpose of the amendment is to avoid disqualification of the judge or invalidation of prior proceedings that might otherwise result from such circumstances.

A somewhat different proposal directed to the same end appeared as Title IX of S. 645 of the 98th Congress as reported by the Senate Judiciary Committee Subcommittee on Courts. As indicated in our comments on that proposal, 5/ the purpose of the proposed change seems unobjectionable, but some care is required in drafting an amendment to avoid unintended consequences. We

4/ 130 Cong. Rec. E3404-05 (daily ed. July 18, 1985).

5/ Letter of Assistant Attorney General Robert A. McConnell to Honorable Strom Thurmond Concerning S. 645, at 11 (Mar. 26, 1984).

would expect to include an analysis of this question in our subsequent statement, and would be glad to provide the Subcommittee with any desired assistance in the further development of this proposal.

* * *

In sum, the Department of Justice has no objection to enactment of H.R. 1472 (remarriage of annuitants) and H.R. 2724 (D.C. District Court fees). We also have no objection in principle to the types of reforms proposed in H.R. 2446 (removal jurisdiction) and H.R. 3044 (judicial disqualification), but expect to submit additional comments concerning their formulation. We oppose the enactment of H.R. 2187 (judges' commuting expenses) and defer to Congress' judgment concerning the draft bill relating to judicial survivors' annuities. Pending further study and consideration, we reserve judgment concerning H.R. 2561 (judges' travel expenses).

Mr. KASTENMEIER. Thank you, Mr. Mullins. Your statement in its entirety will be placed into the record, and we compliment you on your brief statement.

As regards one of the last two bills you mentioned, H.R. 3049, which provides for judicial review of certain orders of the Federal Maritime Administration in the U.S. court of appeals, the subcommittee has received comments from the Department of Transportation, as cleared by the OMB and the Maritime Commission. There being no objection, these two statements will appear in the hearing record subsequent to your remarks.

Mr. MULLINS. Thank you, Mr. Chairman.

[The information follows:]



U.S. Department of
Transportation

General Counsel

400 Seventh St. S.W.
Washington, D.C. 20590

JUL 29 1985

The Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Reference is made to the hearing scheduled on July 29, 1985, before your Subcommittee on court reform proposals. We are informally advised that a number of bills will be considered at this hearing. Of particular interest to the Department of Transportation is H.R. 3049, a bill --

"To amend title 28, United States Code, to provide for judicial review of certain orders of the Federal Maritime Commission and the Maritime Administration in the United States Courts of Appeals."

The Department of Transportation would appreciate your consideration of the following views with respect to H.R. 3049.

Section 2342 of title 28, United States Code (Hobbs Act) provides for judicial review of such final orders of the Federal Maritime Commission (FMC) or the Maritime Administration of this Department (MARAD) which are entered into under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, as are subject to judicial review under section 810 of title 46.

Both the FMC and MARAD are granted certain authority by the Shipping Act, 1916, as amended (46 App. U.S.C. 801 et seq.). MARAD has certain responsibilities under section 2 concerning citizenship; under sections 9, 37 and 41, concerning the transfer of U.S. vessels to foreign registry or for scrapping; and general authority under section 43 for rulemaking. Prior to the enactment of the Shipping Act of 1984 (Public Law 98-237, approved March 20, 1984) (46 App. U.S.C. 1701 et seq.), the FMC regulated ocean common carriers operating in the foreign commerce of the United States under various provisions of the Shipping Act, 1916. The Shipping

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Act of 1984 replaced the Shipping Act, 1916, as the authority of the FMC to regulate these ocean carriers. Unfortunately, the Shipping Act of 1984 contains no general review provision, and the conforming amendments failed to amend the Hobbs Act to provide for such review. The judicial review procedure available to MARAD under the Hobbs Act was not affected by the passage of the 1984 Shipping Act. However, the enactment of the new Shipping Act unintentionally resulted in a situation where FMC orders under the Shipping Act, 1916, and the Intercoastal Shipping Act of 1933 remain reviewable in the Court of Appeals, while FMC orders under the Shipping Act of 1984, are reviewable in the District Courts. This bifurcated review procedure is burdensome and unnecessary.

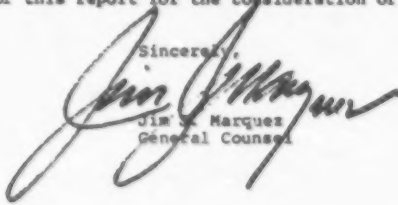
In order to remedy this situation, the Senate Committee on Commerce, Science, and Transportation amended S. 679, the Maritime Appropriation Authorization Act for Fiscal Year 1986, by the addition of a section 4, which would amend the Hobbs Act so that it would apply to all FMC final orders entered under title 46, United States Code. However, the Senate amendment did not include MARAD's existing review authority under the Hobbs Act. S. 679 passed the Senate on June 5, 1985, and was thereafter referred to the House Merchant Marine and Fisheries Committee. The provision in S. 679 amending the Hobbs Act was referred to the Committee on the Judiciary.

On July 19, 1985, Chairman Rodino introduced H.R. 3049 to amend the Hobbs Act in order to provide review authority for both the FMC and MARAD. Section 1 of the bill would amend the Hobbs Act to in part restore Hobbs Act jurisdiction over MARAD's orders under the Shipping Act, 1916.

The Department of Transportation favors the approach taken in H.R. 3049, but recommends that the first section be amended also to include judicial review of the determinations of this Department under sections 2, 9, 37, and 43 of the Shipping Act, 1916. In this regard, we recommend that subparagraph (A) on line 6 of page 1 be amended to read as follows: "(A) the Secretary of Transportation issued pursuant to sections 2, 9, 37, 41, and 43 of the Shipping Act, 1916 (46 App. U.S.C. 802, 803, 808, 835, 839, 841a); and". With this amendment, the Department supports the enactment of H.R. 3049.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the submission of this report for the consideration of the Committee.

Sincerely,

A handwritten signature in dark ink, appearing to read "Jim A. Marques". The signature is fluid and cursive, with a large initial "J" and "M".

Jim A. Marques
General Counsel

STATEMENT FOR THE RECORD OF JAMES J. CAREY
VICE CHAIRMAN OF THE FEDERAL MARITIME COMMISSION
ON H.R. 3049
BEFORE THE SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
JULY 29, 1985

I am pleased to have this opportunity to present the views of the Federal Maritime Commission on H.R. 3049, a bill to amend title 28 of the United States Code to provide for the judicial review of certain orders of the Commission and the Maritime Administration in the United States courts of appeals.

In essence, H.R. 3049 would amend the Administrative Orders Review Act of 1950 (28 U.S.C. § 2342) to clarify that all rules, regulations and final orders issued by the Commission pursuant to the five major statutes over which it has jurisdiction will be initially reviewed in the United States courts of appeals rather than first in the federal district courts, with a subsequent right of appeal to the courts of appeals.

For the reasons which follow, the Commission supports these changes and urges prompt passage of this bill.

The need for this legislation became apparent after the recent enactment of the Shipping Act of 1984 (46 U.S.C. app. § 1701, et seq.), a successor to the Shipping Act, 1916 (46 U.S.C. app. § 801, et seq.), with respect to the regulation of U.S. waterborne foreign commerce. Prior to that time, almost all final orders of the Commission (including rules and

regulations) were initially reviewed by the United States courts of appeals pursuant to the Administrative Orders Review Act. This statute gave the courts of appeals exclusive jurisdiction over final orders of the Commission "... entered under chapters 23 and 23A of title 46" (28 U.S.C. § 2342(3)). Chapter 23 contains the Shipping Act, 1916 and Chapter 23A the Intercoastal Shipping Act, 1933. The only exception to this procedure was Commission orders issued under section 19 of the Merchant Marine Act, 1920 (46 U.S.C. app. § 876).

The 1984 Act, however, failed to make any general provision for review of Commission orders issued pursuant to it. The only specific reference to judicial review of Commission orders in the 1984 Act occurs in the context of orders assessing civil penalties, which are made reviewable "... under chapter 158 of title 28." (i.e., the Administrative Orders Review Act) (46 U.S.C. app. § 1712(d)). Such orders, however, comprise only a very small portion of types of orders which the Commission has historically issued. As a result, absent any general review provision in the 1984 Act or concurrent amendment of the Hobbs Act, the vast majority of rules, regulations and final orders issued by the Commission pursuant to the 1984 Act must first be reviewed in federal district courts pursuant to 5 U.S.C. §§ 702-704 and 28 U.S.C. § 1331. This anomalous treatment of orders under the 1984 Act serves no valid purpose. The Commission believes that there are several compelling reasons

for adopting legislation which would correct this situation and make all final Commission orders subject to initial review in the courts of appeals.

As an initial matter, it does not appear that Congress specifically intended the present situation. There is nothing in the legislative history of the 1984 Act which addresses the issue. Congress' failure to amend 28 U.S.C. § 2342 to include therein orders issued pursuant to the 1984 Act may simply have been a matter of inadvertence. It is probable that all parties involved assumed that the Administrative Orders Review Act would apply to orders issued under the 1984 Act. See S. Rep. No. 64, 99th Cong., 1st Sess. 6, 7 (1985).

The proposed legislation will also make review of orders under the 1984 Act consistent with review under the Shipping Act, 1916 (46 U.S.C. app. § 801, et seq.) and the Intercoastal Shipping Act, 1933 (46 U.S.C. app. § 843, et seq.). Since the enactment of the Administrative Orders Review Act in 1950, final orders under these latter two statutes have been subject to initial exclusive review in the United States courts of appeals. Though the 1916 Act and the 1933 Act apply to waterborne transportation in the domestic offshore trades and the 1984 Act applies to ocean transportation in the foreign commerce, all three deal with similar issues and in many instances contain similar prohibitions. There is no apparent reason for treating review of orders under these statutes differently. Congress' decision to subject orders under the

1916 Act and 1933 Act to review in the courts of appeals suggests that similar treatment for orders under the 1984 Act may be appropriate

Federal courts of appeals are not courts of general jurisdiction. They possess only such jurisdiction as has been expressly conferred on them by statute. Russell v. Law Enforcement Assistance Administration, 637 F.2d 354, 355 (5th Cir. 1976). In the absence of an express grant of review authority in the courts of appeals, either in an enabling statute or in the Administrative Orders Review Act, an administrative agency's orders would be first reviewed in the federal district courts pursuant to 5 U.S.C. §§ 702-704 and 28 U.S.C. § 1331, and then subsequently subject to review in the courts of appeals.

The modern trend is to eliminate this double layer of review, and make agency orders reviewable directly in the courts of appeals. See, generally, C. Wright, A. Miller, and E. Cooper, 13 Federal Practice and Procedure, § 3568, at 463 (1975); *id.* at 13 Supp., § 1368 at 365 (1980); E. Davis, Administrative Law Treatise, § 21.3, at 130-131 (2d Ed. 1983). In fact, the vast majority of important administrative agency actions are now reviewable initially in the courts of appeals, rather than the district courts. E. Davis, *id.* (For a partial list of such agency actions see 16 C. Wright, A. Miller, and E. Cooper, *supra*, § 3941, at 704-308 (1977)). The Administrative Orders Review Act itself gives the courts of appeals exclusive

jurisdiction over certain orders of the Federal Communications Commission, the Department of Agriculture, the Maritime Administration, the Atomic Energy Commission, and the Interstate Commerce Commission.

Moreover, the two-layered system of review has been criticized as wasteful and time consuming by both treatise writers and courts. See, e.g., ' E. Davis, supra, § 23.3 at 130-131, § 23.5 at 133-134; 1' C. Wright, A. Miller, and E. Cooper, supra, § 3940 at 702; Polcover v. Secretary of Treasury, 477 F.2d 1223, 1227 (D.C. Cir.), cert. denied, 414 U.S. 1001 (1973). Administrative agencies perform the same functions with respect to the courts of appeals as do district courts. In both FMC rulemaking and adjudication proceedings, an administrative record is prepared and reviewed and issues are identified and resolved. In many FMC proceedings, the issues are subject to the further testing of intra-agency review on appeal from an administrative law judge and resolution by a collegial body - the Commissioners. The questions open for judicial review are commonly questions of law, or review of a record for substantial evidence to support the administrative decision or assurance that the agency action is not arbitrary, capricious, or an abuse of discretion - matters as to which a district court would play the same role as a court of appeals.

Review initially by a district court, and then by a court of appeals, would impose added burdens or delay on the review process for administrative actions and an additional layer of expense to the government and private parties. It was, in fact, just such considerations which motivated Congress to place final agency orders issued pursuant to the 1916 Act and the 1933 Act under direct court of appeals review in 1950. See H.R. Rep. No. 2122, 81st Cong., 2d Sess. 3-5 (1950), reprinted in 1950 U.S. Code Cong. Serv. 4305-4307.

Review of all FMC final orders under the Administrative Orders Review Act will, moreover, ensure that such review is made in a timely fashion, i.e., 60 days after entry of such an order. See 28 U.S.C. § 2344. Absent application of that statute, FMC orders would be subject to district court review at any time, leaving the agency subject to open-ended attacks on its decisions, limited only by the nebulous and uncertain defense of laches. See e.g., D.B. Ford, Inc. v. U.S., 380 F.Supp. 1202, 1207-1208 (D. Minn. 1974). The presence of such open-ended attack was, in fact, one of the reasons why ICC orders were subjected to court of appeals review under the Administrative Orders Review Act. See H.R. Rep. No. 1569, 93d Cong., 2d Sess. 4, 9 (1974), reprinted in 1974 U.S. Code Cong. and Ad. News 8150, 8155.

Moreover, when new statutory authority was recently given to the Interstate Commerce Commission, the Administrative Orders Review Act was specifically amended to ensure that

actions under that new authority would be reviewed by the courts of appeals, rather than federal district courts. See Household Goods Transportation Act of 1980, § 8(b)(2), P.L. 96-454, 94 Stat. 2021, 49 U.S.C. § 1190(i)(2); H.R. Rep. No. 497, 96th Cong., 2d Sess. 16 (1980), reprinted in 1980 U.S. Code Cong. and Ad. News 4286-4287. Similar treatment for the FMC as a result of the Shipping Act of 1984 would seem to be appropriate.

Amendment of the Administrative Orders Review Act to provide for judicial review of all final FMC orders initially in the courts of appeals will make uniform the form of review of final FMC orders and result in the prevention of needless delay and expense to the government and private parties.

Mr. KASTENMEIER. Although you made clear that you will have more to say later on about H.R. 3044, concerning judicial disqualification, you said it might result in unintended consequences.

What might those unintended consequences be? I note that you hope to explore more fully presumably that matter in due course. Since you have intrigued us with that phrase, I thought you might at this point be willing to suggest what an unintended consequence might possibly be.

Mr. MULLINS. I recall in our letter on S. 645, covering a different proposal, there was concern that it was drafted so that even if the judge's wife was counsel for one of the parties, that would come within the exception to the disqualification rule.

The current version is more simple in its formulation, but still we would want to take a fine-tooth comb to it before speaking further on this question.

Mr. KASTENMEIER. All right.

Notwithstanding Judge Hunter's assurance, let me ask you the same question with reference to permitting Federal district courts to hear and determine cases brought in State courts not having jurisdiction over those matters.

Could the bill create an incentive to misfile in State courts?

Mr. MULLINS. The Department does not believe it really could, because in addition to petitioning for removal of the case to Federal court, defense counsel could move to dismiss for want of subject matter jurisdiction if the State courts lack jurisdiction over the matter. If there is a subject matter jurisdiction problem in State court, in most cases that would be as in the Federal courts, something that could be raised by any party or by the court *sua sponte* at any stage in the litigation.

This, in addition to being an embarrassment to those concerned, would result in quite an unnecessary waste of time and effort.

I should say that our civil division quite often gets suits brought improperly in State court. In most cases, rather than adopting dilatory defense tactics, they would just as soon resolve the matter by removing the case into Federal court where it belongs and proceeding to the merits. The proposed reform would accordingly serve the needs of economy and efficiency in the Justice Department's litigation, as well as in that of other parties generally.

Mr. KASTENMEIER. Now, there is one bill you are quite clear on as far as opposition. It is Congressman Ralph Hall's bill, H.R. 2187, payment of judges' commuting expenses.

Do you feel that such expenses might be abused such as reimbursement of a judge who decided to commute to work each day by chauffeured limousine or by helicopter. Or is it really that you believe the normal arrangement in both public and private employment is that employees bear their own commuting expenses.

Presumably, no matter how minimal they might be, this is really the main objection you have?

Mr. MULLINS. I think our objection lies to the paying of commuting expenses in any amount. We just wanted to alert the subcommittee to the potential abuses to which this broadly worded bill could be put.

I think that Chief Judge Clark made many excellent points concerning the reasons why you would want judges living close to

their duty station—so that they will be available on short-term notice to handle emergencies, to step in whenever needed. Judges living nearby would also be less likely to miss days of work based upon commuting difficulties, either mechanical or weather related.

It is not, as Judge Clark said, an 8-hour-a-day, punch-a-clock type of job. Often in pressure situations, judges are putting in as much time as they are physically able to. If they have a short rather than a long commute, they can better devote their time to crises and heavy workload situations.

In my experience working with the judicial appointments process, I found very little reticence on the part of judicial candidates to move a small ways if need be to be close to the Federal courthouse, such as in rural districts where there may be a need for a move. It has not generally been a problem, and most accept that as part of the cost of assuming the honor and prestige of a Federal judgeship.

Mr. KASTENMEIER. On the other hand, as relates to actual travel expenses, you do not oppose that proposal; although, you want to study it. And, presumably, you would want to assure yourself that it would not be abused.

Mr. MULLINS. That is correct.

Mr. KASTENMEIER. Well, I think that concludes my questions. I again thank you for your statement in behalf of the Justice Department, Mr. Mullins. You have been a very helpful witness. We will hear further from you.

Mr. MULLINS. I hope the statement will be coming shortly, hopefully by the time you return from the August recess. [See Appendix II(A).]

It has been a pleasure working with the committee.

Mr. KASTENMEIER. That concludes our hearing for today. The committee stands adjourned.

[Whereupon, at 3:33 p.m., the subcommittee adjourned, subject to the call of the Chair.]

APPENDIXES

APPENDIX I BILLS

1

99TH CONGRESS
1ST SESSION

H. R. 1472

To amend section 376 of title 28, United States Code, to provide that certain judicial annuities for surviving spouses shall not terminate by reason of remarriage of an annuitant after age sixty.

IN THE HOUSE OF REPRESENTATIVES

MARCH 7, 1985

Mr. GREEN introduced the following bill, which was referred to the Committee on the Judiciary

A BILL

To amend section 376 of title 28, United States Code, to provide that certain judicial annuities for surviving spouses shall not terminate by reason of remarriage of an annuitant after age sixty.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 That section 376 of title 28, United States Code, is amended
- 4 in subsection (h)(2), by striking out "upon his or her death or
- 5 remarriage" and inserting in lieu thereof "upon the death of
- 6 the annuitant or upon the remarriage of the annuitant prior
- 7 to attaining sixty years of age".

(93)

1 SEC. 2. The amendments made by this Act shall take
2 effect on the first day of the first month beginning after the
3 date of the enactment of this Act.

99TH CONGRESS
1ST SESSION

H. R. 2187

To amend section 456 of title 28, United States Code, to provide for payment of commuting expenses for justices and judges who reside within three hundred miles of their official duty stations.

IN THE HOUSE OF REPRESENTATIVES

APRIL 23 (legislative day, APRIL 22), 1985

Mr. RALPH M. HALL introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend section 456 of title 28, United States Code, to provide for payment of commuting expenses for justices and judges who reside within three hundred miles of their official duty stations.

- 1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That section 456 of title 28, United States Code, is amended
4 by adding at the end thereof the following:
5 “(h) The Director of the Administrative Office of the
6 United States Courts shall pay each justice or judge of the
7 United States and each retired justice or judge recalled or
8 designated and assigned to active duty, whose actual abode

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1 where he or she customarily lives is not more than three
2 hundred miles from his official duty station, actual transpor-
3 tation expenses certified by the justice or judge that are in-
4 curred for traveling between such abode and his or her offi-
5 cial duty station.".

99TH CONGRESS
1ST SESSION

H. R. 2446

To amend title 28, United States Code, to permit Federal district courts to hear and determine cases brought in State courts not having jurisdiction over them.

IN THE HOUSE OF REPRESENTATIVES

MAY 8, 1985

Mr. SYNAR introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 28, United States Code, to permit Federal district courts to hear and determine cases brought in State courts not having jurisdiction over them.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Removal Jurisdiction Act
5 of 1985".

6 **SEC. 2. SECTION 1441 AMENDMENT.**

7 Section 1441 of title 28, United States Code, is amend-
8 ed by adding at the end thereof the following new subsection:

9 "(e) The court to which such civil action is removed is
10 not precluded from hearing and determining any claim in

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1 such civil action because the State court from which such
2 civil action is removed did not have jurisdiction over that
3 claim.”.

4 **SEC. 3. EFFECTIVE DATE.**

5 The amendment made by this Act shall apply with re-
6 spect to claims in civil actions commenced in State courts on
7 or after the date of the enactment of this Act.

99TH CONGRESS
1ST SESSION

H. R. 2561

To amend section 456 of title 28, United States Code, to allow actual travel expenses of justices and judges.

IN THE HOUSE OF REPRESENTATIVES

MAY 21, 1935

Mr. KASTENMEIER (for himself and Mr. MOORHEAD) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend section 456 of title 28, United States Code, to allow actual travel expenses of justices and judges.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That section 456(a) of title 28, United States Code, is
4 amended by striking out "for any continuous period" and all
5 that follows through the end of the subsection and inserting
6 in lieu thereof the following: "all necessary transportation
7 expenses and actual and necessary expenses of subsistence
8 actually incurred, notwithstanding the provisions of section
9 5702 of title 5, United States Code, in accordance with regu-
10 lations which the Director shall prescribe with the approval

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- 1 of the Judicial Conference of the United States. In determin-
- 2 ing necessary expenses, the Director shall take into account
- 3 the costs of transportation and subsistence generally incurred
- 4 for travel to the geographic area involved.”.

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99TH CONGRESS
1ST SESSION

H. R. 2724

To provide that filing and miscellaneous fees for the United States District Court for the District of Columbia shall be collected in the same manner as such fees are collected for the other district courts in the United States.

IN THE HOUSE OF REPRESENTATIVES

JUNE 11, 1985

Mr. KASTENMEIER (for himself and Mr. MOORHEAD) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To provide that filing and miscellaneous fees for the United States District Court for the District of Columbia shall be collected in the same manner as such fees are collected for the other district courts in the United States.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 That section 1914 of title 28, United States Code, relating to
- 4 district court fees, is amended by striking out subsection (d).

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[THE DRAFT BILL REFERRED TO IN THE WITNESS STATEMENTS, RELATING TO JUDICIAL
DISQUALIFICATION, IS IDENTICAL TO H.R. 3044]

99TH CONGRESS
1ST SESSION

H. R. 3044

To amend section 455 of title 28, United States Code, with respect to
disqualification of Federal judges in class actions.

IN THE HOUSE OF REPRESENTATIVES

JULY 18, 1985

Mr. KASTENMEIER introduced the following bill; which was referred to the
Committee on the Judiciary

A BILL

To amend section 455 of title 28, United States Code, with
respect to disqualification of Federal judges in class actions.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. DISQUALIFICATION OF JUDGES IN CLASS AC-
4 TIONS.

5 Section 455 of title 28, United States Code, relating to
6 disqualification of a justice, judge, or magistrate, is amend-
7 ed—

8 (1) by redesignating subsection (a) as subsection
9 (f); and

10 (2) by inserting after subsection (d) the following:

1 “(e) For purposes of this section, an absent class
2 member in a class action shall not be considered to be a party
3 or to have a financial interest in the subject matter in contro-
4 versy, but shall be considered to be a person with an interest
5 that could be affected by the outcome of the proceeding.”.

6 **SEC. 2. APPLICABILITY TO FUTURE DISQUALIFICATIONS**
7 **ONLY.**

8 The amendments made by section 1 shall not affect any
9 ruling made before the date of the enactment of this Act with
10 respect to a disqualification under section 455 of title 28,
11 United States Code.

99TH CONGRESS
1ST SESSION

H. R. 3049

To amend title 28, United States Code, to provide for judicial review of certain orders of the Federal Maritime Commission and the Maritime Administration in the United States Courts of Appeals.

IN THE HOUSE OF REPRESENTATIVES

JULY 18, 1985

Mr. RODINO introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 28, United States Code, to provide for judicial review of certain orders of the Federal Maritime Commission and the Maritime Administration in the United States Courts of Appeals.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 That section 2342(3) of title 28, United States Code, is
4 amended to read as follows:

5 “(3) all rules, regulations, or final orders of—

6 “(A) the Secretary of Transportation issued
7 pursuant to section 41 of the Shipping Act, 1916

8 (46 U.S.C. App. 839); and

1 “(B) the Federal Maritime Commission
2 issued pursuant to—

3 “(i) section 23, 25, or 43 of the Ship-
4 ping Act, 1916 (46 U.S.C. App. 822, 824,
5 or 841a);

6 “(ii) section 19 of the Merchant Marine
7 Act, 1920 (46 U.S.C. App. 876);

8 “(iii) section 2, 3, 4, or 5 of the Inter-
9 coastal Shipping Act, 1933 (46 U.S.C. App.
10 844, 845, 845a, or 845b);

11 “(iv) section 14 or 17 of the Shipping
12 Act of 1984 (46 U.S.C. App. 1713 or 1716);
13 or

14 “(v) section 2(d) or 3(d) of the Act of
15 November 6, 1966 (46 U.S.C. App. 817d(d)
16 or 817e(d);”.

[THE DRAFT BILL REFERRED TO IN THE WITNESS STATEMENTS, RELATING TO JUDICIAL SURVIVORS' ANNUITIES, IS IDENTICAL TO H.R. 3081]

99TH CONGRESS
1ST SESSION

H. R. 3081

To amend section 376 of title 28, United States Code, in order to reform and improve the existing program for annuities for survivors of Federal justices and judges.

IN THE HOUSE OF REPRESENTATIVES

JULY 25, 1985

Mr. KASTENMEIER (for himself, Mrs. SCHROEDER, Mr. MOORHEAD, Mr. HYDE, Mr. FRANK, Mr. KINDNESS, Mr. BERMAN, Mr. LAGOMARSINO, Mr. FASIO, Mr. WOLF, Mr. OBERSTAR, Mrs. BENTLEY, Mr. LELAND, Mr. JEFFORDS, and Mr. MARTINEZ) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend section 376 of title 28, United States Code, in order to reform and improve the existing program for annuities for survivors of Federal justices and judges.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 *That this Act may be cited as the "Judicial Survivors' Annu-*
4 *ities Amendments Act".*

5 SEC. 2. Section 376 of title 28, United States Code, is
6 amended as follows:

1 (1) Subsections (b) and (d) are each amended by
2 striking out "4.5 percent" each place it appears and
3 inserting in lieu thereof "5 percent".

4 (2) Subsection (c) is amended to read as follows:

5 "(c)(1) There shall also be deposited to the credit of the
6 Judicial Survivors' Annuities Fund, in accordance with such
7 procedures as the Comptroller General of the United States
8 may prescribe, amounts required to reduce to zero the un-
9 funded liability of the Judicial Survivors' Annuities Fund.
10 Such deposits shall be taken from the fund used to pay the
11 compensation of the judicial official, and shall immediately
12 become an integrated part of the Judicial Survivors' Annu-
13 ities Fund for any use required under this section.

14 "(2) For purposes of paragraph (1), the term 'unfunded
15 liability' means the estimated excess, determined by the
16 Comptroller General on an annual basis, of the present value
17 of all benefits payable from the Judicial Survivors' Annuities
18 Fund, over the sum of—

19 "(A) the present value of deductions to be with-
20 held from the future basic pay of judicial officials; plus

21 "(B) the balance in the Fund as of the date the
22 unfunded liability is determined.

23 In making any determination under this paragraph, the
24 Comptroller General shall use the applicable information con-
25 tained in the reports filed pursuant to section 9503 of title

3

1 31, United States Code, with respect to the judicial survi-
2 vors' annuities plan established by this section."

3 (3) Subsection (h) is amended—

4 (A) in paragraph (1)(B), by striking out
5 clauses (i) and (ii) and inserting in lieu thereof the
6 following:

7 "(i) 10 percent of the average annual
8 salary determined under subsection (l)(1) of
9 this section; or

10 "(ii) 20 percent of such average annual
11 salary, divided by the number of children;";

12 (B) in paragraph (1)(C) by striking out
13 clauses (ii) and (iii) and inserting in lieu thereof
14 the following:

15 "(ii) 20 percent of the average annual
16 salary determined under subsection (l)(1) of
17 this section; or

18 "(iii) 40 percent of such average annual
19 salary amount, divided by the number of
20 children;"; and

21 (C) in paragraph (2) by inserting immediately
22 after "remarriage" the following: "before attain-
23 ing age sixty".

24 (4) Subsection (l) is amended—

1 (A) by striking out "1 ¼ percent" and insert-
2 ing in lieu thereof "1.5 percent";

3 (B) in paragraph (2) by striking out the colon
4 after "subsection" and inserting in lieu thereof a
5 semicolon; and

6 (C) by striking out the proviso and inserting
7 in lieu thereof the following: "except that such
8 annuity shall not exceed an amount equal to 55
9 percent of such average annual salary, nor be less
10 than an amount equal to 30 percent of such aver-
11 age annual salary. Any annuity determined in ac-
12 cordance with the provisions of this subsection
13 shall be reduced to the extent required by subsec-
14 tion (d) of this section."

15 (5) Subsection (a) is amended—

16 (A) in paragraph (1)(C) by inserting "or
17 Deputy Director" immediately after "Director";
18 and

19 (B) in paragraph (2)(C) by inserting "or
20 Deputy Director" immediately after "Director".

21 SEC. 3. The benefits conferred by section 376 of title
22 28, United States Code, by reason of the amendments made
23 by this Act shall apply only to individuals who become eligi-
24 ble for annuities under such section on or after the effective
25 date of this Act, except that—

1 (1) such annuities shall be computed in accordance
2 with the provisions of section 376 of title 28, United
3 States Code, as amended by this Act, notwithstanding
4 contributions or deposits made in accordance with ap-
5 plicable law at lower rates; and

6 (2) no additional liability shall be created with re-
7 spect to deposits made in accordance with applicable
8 law before the effective date of this Act, or after such
9 effective date pursuant to an agreement entered into
10 before such effective date.

11 SEC. 4. (a) Within 180 days after the effective date of
12 this Act, any judicial official who, before such effective date,
13 made an election under section 376 of title 28, United States
14 Code, to come within the purview of that section, shall be
15 entitled to revoke that election. Such revocation shall consti-
16 tute a complete withdrawal from the judicial survivors' annu-
17 ities program provided for in such section 376. No such revo-
18 cation shall be effective unless it is submitted in writing to
19 the Director of the Administrative Office of the United States
20 Courts, and until such writing is received by the Director.
21 Upon receipt by the Director of such writing, any rights to
22 survivorship benefits for the survivors of such judicial official
23 shall terminate, and all amounts credited to the individual
24 account of such judicial official under section 376(e), together
25 with interest at 3 per centum per annum, compounded on

1 December 31 of each year to such date of revocation, shall be
2 returned to that judicial official in a lump-sum payment.

3 (b) Any judicial official who makes a revocation under
4 subsection (a) of this section and who thereafter becomes eli-
5 gible to make an election under section 376(b) of title 28,
6 United States Code, may make such election only if such
7 judicial official redeposits, to the credit of the Judicial Survi-
8 vors' Annuities Fund, the full amount of the lump-sum pay-
9 ment made to such judicial official under subsection (a) of this
10 section, together with interest at 3 per centum per annum,
11 compounded on December 31 of each year from the date of
12 such revocation until the date upon which that amount is so
13 redeposited.

14 (c) Any judicial official who fails to revoke an election in
15 accordance with subsection (a) of this section shall be deemed
16 to have irrevocably waived the right to make that revocation.

17 SEC. 5. This Act shall take effect on the first day of the
18 third month following the month in which it is enacted, or on
19 October 1, 1984, whichever occurs later.

APPENDIX II

ADDITIONAL MATERIALS ON ALL THE BILLS



U.S. Department of Justice

Office of Legal Policy

Assistant Attorney General

Washington, D.C. 20530

September 30, 1985

Honorable Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Civil Liberties
and the Administration of Justice
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter supplements the July 29 testimony of Deputy Assistant Attorney General Dennis F. Mullins concerning various court reform bills that are presently before your Subcommittee. The specific bills on which we have additional comments are H.R. 3049, H.R. 2446, H.R. 2561, and H.R. 3044.

I. H.R. 3049 -- Appellate Review of Maritime
Commission and Maritime Administration Orders

H.R. 3049 would authorize direct court of appeals review of orders of the Federal Maritime Commission (FMC) and the Maritime Administration. This would correct an unintended consequence of the Shipping Act of 1984, which has resulted in review of certain FMC orders in the district courts.

The views of the Administration on this proposal are set out in our testimony of July 29 and in a letter of the same date sent to the Subcommittee by the Department of Transportation (DOT). As stated in DOT's letter, we support this legislation subject to an amendment which would include within the bill's coverage orders of the Secretary of Transportation pursuant to sections 2, 9, 37, and 43 of the Shipping Act, 1916, as well orders pursuant to section 41 of that Act. These orders are currently subject to direct review in the courts of appeals. The suggested amendment would simply make it clear that no change in this arrangement is intended.

II. H.R. 2446 -- Removal Jurisdiction

H.R. 2446 would repeal the derivative jurisdiction doctrine, under which cases within the exclusive jurisdiction of the federal courts which are improperly commenced in state court cannot be removed to federal court, but must be dismissed by the

federal court if removal is attempted. Under the bill, the defendant in such a case would retain his current option of moving for dismissal of the case by the state court, but would also be afforded the alternative option of removing the case and proceeding with it in federal court. For the reasons noted in our testimony, we support this reform.

A question that arises under this proposal is whether the abrogation of the derivative jurisdiction doctrine should be confined to removal under 28 U.S.C. § 1441, or should also cover the narrower removal provisions in 28 U.S.C. §§ 1442-44. The Subcommittee staff has asked us specifically to comment on the implications for federal government litigation of including the latter provisions within the coverage of the bill.

In general, these provisions permit the Department to remove to federal court certain cases commenced in state court against federal officers or the United States. There would be no adverse effect on our litigation if we were to have the option of removal to federal court under these provisions in cases in which the state court lacked jurisdiction.

III. H.R. 2561 -- Judges' Travel Expenses

H.R. 2561 would eliminate the current statutory limits on reimbursement of judges' travel expenses, providing instead for reimbursement of necessary expenses subject to limitations imposed by regulation. We are in agreement with the proposal's objective of ensuring that judges are not deterred from accepting travel assignments by inadequate reimbursement, and are not unfairly required to incur personal expenses in carrying out their duties, but do not take any position concerning the specific reform proposed in H.R. 2561 at this time. As our testimony noted, comparable questions concerning reimbursement of travel expenses for executive branch employees are currently under study within the Administration. We will continue to consider the proposal of H.R. 2561 in connection with our general review of this area.

IV. H.R. 3044 -- Disqualification of Judges

H.R. 3044 would amend the judicial disqualification statute, 28 U.S.C. § 455, to provide that class members in a class action, other than named class representatives, are not to be considered parties or persons having a financial interest in the subject matter in controversy. The practical effect of the proposal would be that disqualification pursuant to § 455(b)(4) based on a relationship to an absent class member would depend on a determination that a judge or a member of his family had an interest that could be substantially affected by the outcome.

The purpose of the bill is to meet situations like that presented in In Re Cement & Concrete Antitrust Litigation, 513 F. Supp. 1076 (D. Ariz. 1981), in which current law would apparently

require a judge to disqualify himself based on a financial interest in a class member that could not be substantially affected by the outcome of the case. In that case, a judge who had put several years of work into a complex class action disqualifies himself when it appeared unexpectedly that his wife owned securities in several members of the plaintiff class. While the wife's financial interest in these class members was substantial -- amounting to about \$50,000 -- the likely effect of the litigation on that interest was slight. The decision included an uncontested estimate that the value of the stock would be increased by somewhere between \$4.23 and \$29.70 by a judgment in favor of the plaintiffs.

As indicated in our testimony of July 29, we are sympathetic to some change in the disqualification statute to deal with situations of this sort. When a disqualifying financial interest in a class member appears unexpectedly following a substantial investment of a judge's time in a case, the applicable law should at least afford the option of divestment of the disqualifying interest as an alternative to disqualification of the judge.

Whether a broader exception, not involving a requirement of divestment, should be recognized to the normal disqualification standards for cases of this sort is a difficult question. Even if a judge's potential gain or loss from the outcome of a case is slight, adversely affected parties may feel or allege that a judge would identify psychologically with the interest of enterprises in which he or his family have a significant investment. This point is illustrated by the In Re Cement & Concrete Antitrust Litigation case, in which the judge's wife held \$50,000 of securities in members of the plaintiff class.

H.R. 3044 raises this general question and also illustrates some more specific pitfalls in framing a broad exception to the general disqualification standards. Under the bill, an absent class member would not be considered a "party." However, one of the grounds of judicial disqualification, set out in § 455(b)(1), is "personal bias or prejudice [by a judge] concerning a party." Since absent class members would not be "parties" for disqualification purposes under H.R. 3044, personal bias or prejudice by a judge concerning an absent class member would not result in disqualification under § 455(b)(1) under the approach of that bill.

Similarly, § 455(b)(4) provides for disqualification where the judge or a member of his family has a financial interest in the subject matter in controversy or in a party to the proceeding, and § 455(d)(4) defines "financial interest" to include a position as a "director, adviser, or other active participant in the affairs of a party." Under the amendment of H.R. 3044, disqualification would not arise under these provisions even if the judge or a member of his family were a

"director, adviser or other active participant" in the affairs of an absent class member. Nor would a judge be disqualified under § 455(d)(5)(i), which covers situations in which the judge or a relative of the judge is "a party to the proceeding, or an officer, director, or trustee of a party."

A more general problem with the approach of H.R. 3044 is that it is difficult to justify in principle having different disqualification standards for named class representatives and other class members. In rejecting the plaintiffs' contention that absent class members should not be considered "parties," the court stated in In Re Cement & Concrete Antitrust Litigation, *supra*, 515 F. Supp. at 1079:

The problem with plaintiffs' argument is that, where it counts, class members and parties are identical. There is no question that class members are included in the benefits and burdens of a judgment on an equal basis with parties. For this reason, there appears to be no reason in logic why a financial interest "however small" in a named party to a litigation should be ground for recusal, but that the same interest in a class member should not be. Neither the degree of conflict, nor the appearance of impropriety is altered by a litigant's classification as "party" or "class member".

Hence, H.R. 3044 as it is currently drafted is overly broad in some respects. We do not take any position at this time concerning any particular alternative formulation. We would, however, be interested in exploring this issue further with the Subcommittee, and would offer some general observations for the Subcommittee's consideration.

The general problem addressed in H.R. 3044 is that of balancing the interest in judicial efficiency against the interest in avoiding the actuality or appearance of partiality by a judge based on a financial interest in a case. The disqualification statute, in its current formulation, recognizes certain areas in which efficiency interests predominate over relatively tenuous financial interests. For example, § 455(d)(4) provides that disqualifying "financial interests" do not include ownership in a mutual or common investment fund that holds securities, or the proprietary interest of a policyholder in a mutual insurance company or savings association unless the outcome of the proceeding could substantially affect the value of the interest, or ownership of government securities unless the outcome of the proceeding could substantially affect the value of the securities.

The Subcommittee staff has suggested the option of deleting the word "government" from § 455(d)(4)(iv), thereby providing that ownership of any securities -- not just "government" securities -- would not be a disqualifying "financial

interest" unless the value of the securities could be substantially affected by the outcome of the proceeding. This approach would be technically simple, and would be considerably narrower than the current formulation of H.R. 3044. It would, however, make it possible for a judge who had a large holding in the securities of a private party to hear a case, even if that interest were known from the outset of the proceedings. Disqualification in such cases would depend on a finding that the value of the securities could be substantially affected by the outcome, or on the application of the more diffuse mandate of § 455(a) that a judge disqualify himself whenever "his impartiality might reasonably be questioned."

Another possibility was suggested in the testimony of the Judicial Conference on H.R. 3044 at the July 29 hearing. Under the Judicial Conference's proposal, judges would engage in case-by-case balancing of the competing interests in efficiency and disinterestedness in cases in which a financial interest that would not be substantially affected by the outcome appears following a substantial investment of judicial time in a case. This would afford a flexible approach in which the relevant interests could be assessed and compared in a straightforward manner. It would, however, leave much to the potentially disparate judgements of individual judges. Like the preceding option, it would also leave open the possibility of judges' hearing cases in which they have large financial interests in a party on a substantially broader basis than the current formulation of the disqualification statute.

A final possibility is suggested by 18 U.S.C. § 208, a criminal statute governing the disqualification of executive officers and employees based on financial interest. Subsection (a) of the statute generally makes it a felony for an officer or employee to participate in any matter in which he or his family members have a financial interest. Subsection (b) of the statute, however, authorizes the agency head to waive this restriction in cases in which "the interest is not so substantial as to be deemed likely to affect the integrity of the services which the government may expect from such officer or employee."

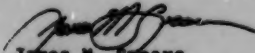
This approach could possibly be adapted to the judicial context by designating a disinterested authority within the judiciary that could waive disqualification in some class of cases in which the judge has a financial interest. By way of comparison, judges currently can seek advisory opinions from a committee of the Judicial Conference concerning ethical considerations affecting disqualification, a mechanism that was resorted to by the judge in In Re Cement & Concrete Antitrust Litigation, *supra*, 515 F. Supp. at 1078-79, 1082-84.

Like any option not requiring divestment, an approach modeled on 18 U.S.C. § 208 would leave open the possibility of a judge's hearing a case in which he has a financial interest in a party. It would, however, avoid the element of self-judgment

involved in having a judge balance his own potential or apparent partiality based on a financial interest against competing considerations of efficiency.

In sum, we support enactment of the reforms proposed in H.R. 2446 and H.R. 3049, subject to the amendment proposed by the Department of Transportation in the case of H.R. 3049. We are sympathetic to the general purposes of H.R. 2561 but take no position at this time concerning its specific reform proposal. We are also sympathetic to the concerns underlying H.R. 3044 but, for the reasons noted above, we recommend against enactment of the bill as currently formulated. We would be pleased to work with the Subcommittee to explore other possible approaches to the problem of judicial disqualification standards.

Sincerely,



James M. Spears
Acting Assistant Attorney General

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American Bar Association

30 October 1985

Congressman Robert W. Kastenmeier
Subcommittee on Courts, Civil Liberties,
& the Administration of Justice
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20510

Dear Mr. Chairman:

The American Bar Association has long supported legislation designed to attract the highest caliber legal minds to the judiciary and to keep them productively engaged in their important work. While the Association has supported and will continue to support legislation to upgrade judicial salaries, we realize that these salaries can never be competitive with the money that able and experienced lawyers can command in a private firm. We consider it imperative, therefore, that judges be relieved to the fullest extent possible of an overpowering concern about the welfare of their families in the event of their death. The present annuity program does not provide them with this peace of mind.

The provisions of H.R. 3570 take a giant step forward, and the ABA urges prompt enactment of this legislation. We commend you for your leadership in sponsoring this measure. The improved provisions for spouses and for dependent children are vital.

The Judicial Survivors' Annuities System (JSAS) was established to provide death benefit coverage for surviving spouses and children of all federal justices and judges who elect to join the program. However, the promise that judges, by making appropriate contributions, may earn, with their years of service, a reasonable degree of security for their survivors has not materialized. The program remains an unattractive investment option, one unresponsive to inflationary conditions and changing earnings conditions. The percentage of new judges entering the program has dropped from a high of 74% in 1976 to 25% today because the present annuity program is inadequate for so many judges' families. Not only does this drop change the actuarial statistics and the cost of the annuity program, but it also means that the government is not presently providing a relevant annuity program to its judicial branch. Without a viable program, an appointment to the bench is much less attractive.

GOVERNMENTAL AFFAIRS GROUP

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We believe the bench should be a serious option for talented younger attorneys. Today, many new judicial appointees are in their early 40s and have young children. Under the present system, a hypothetical judge, age 40, with a wife and three children who are ages 3, 8, and 10 years old, faces a frightening insecurity. If he were to be killed in an accident at age 50, his oldest two children would be in college, and his family would receive a total of \$14,144 a year in annuity payments. Under the provisions of H.R. 3570, this same hypothetical judge would leave his family protected with an income of \$38,000 a year.

The improvements in benefits payable under H.R. 3570 are the result of adjustments in three aspects of the program.

- Surviving Spouses' Annuities. The imposition of new minimum and maximum annuities for spouses is the most important amendment in this regard. While an annuity amount ceiling of 40 percent of the average annual salary figure is currently statutorily mandated, no real floor figure is provided. The establishment of a 30% floor is perhaps the most needed reform in the program.
- Surviving Children's Annuities. Under the present system, surviving children's annuities are determined by statutorily designated dollar figures that vary according to whether a surviving spouse is also receiving an annuity. Since the fixed dollar benefit has not been consistently revised to keep pace with economic reality, the children's annuity is inadequate. The proposed remedy would eliminate the statutorily designated amounts by substituting a formula, consisting of a stipulated percentage of the high-three-year average annual salary figure, and set the percentage high enough to ensure a reasonable annuity.
- Preserving the Program's Financial Integrity. The proposed amendments to the JSAS, if adopted, will increase the cost of the program. To maintain the actuarial integrity of the program, H.R. 3570 proposes a modification of the "matching" contribution arrangement. The current contribution rate for judges would increase from 4.5 to 5.0 percent of annual salary. The government would provide the necessary additional funds from general appropriations to maintain the program.

The ABA urges that H.R. 3570 be quickly enacted. In endorsing this proposal, the ABA seeks to enhance the value of the JSAS and preserve its financial stability. The Association believes that it is essential to keep judicial appointments free of economic considerations. It would serve the bench poorly if it became necessary to appoint only judges who had outside income and investments. It could come to this if a price for service on the bench is that judges' families must suffer undue hardships. One federal judge recently wrote his Congressman to say, "I love this job, but I must admit that sometimes I wonder if I am being fair to my wife and children by not exploring other possibilities."

I am enclosing a copy of the statement of John C. Shepherd and Morris Harrell on behalf of the ABA before the Commission on Executive, Legislative and Judicial Salaries on April 3, 1985. In it, the provisions of S.645 of the 98th Congress, which are substantially similar to the reforms proposed in H.R. 3570, are discussed in greater detail.

I thank you for the opportunity to submit the views of the American Bar Association on this important subject.

Sincerely,

Robert D. Evans

Robert D. Evans

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AMERICAN BAR ASSOCIATION

GOVERNMENTAL RELATIONS OFFICE • 1800 M STREET, N.W. • WASHINGTON, D.C. 20036 • (202) 331-2300

STATEMENT OF

JOHN C. SHEPHERD
PRESIDENT, AMERICAN BAR ASSOCIATION

and

MORRIS HARRELL
CHAIRMAN, ABA FEDERAL JUDICIAL COMPENSATION COMMISSION

before the

COMMISSION ON EXECUTIVE, LEGISLATIVE
AND JUDICIAL SALARIES

April 3, 1985

Washington, D.C.

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Mr. Chairman and Members of the Commission:

I am Morris Harrell, of Dallas, Texas. I appear in my capacity as Chairman of the ABA Commission on Federal Judicial Compensation. With me is John C. Shepherd, President of the American Bar Association.

On behalf of the Commission and the ABA, we welcome this opportunity to appear before you today to speak to an important national problem: The inadequacy of the compensation paid to federal court judges. The historic and continuing problem of inadequate judicial compensation is of serious concern to the American Bar Association. The salaries and benefits paid to justices of the Supreme Court and judges of the Circuit and District Courts are not competitive with those for comparable positions in the legal profession and in the private sector generally, making it increasingly more difficult to attract and retain the most qualified judges.

The gravity and urgency of this problem prompted the American Bar Association to increase its efforts to urge the President and Congress to correct the situation. The ABA Board of Governors has designated this issue as one of our top four legislative priorities of the Association for the coming year. To further our objective, the Board created the Commission which I am proud to chair. This Commission is composed of leaders of the business community and private sector, attorneys, and former government officials.

Act, the system-wide participation percentage has declined. After the 1976 reform, 90 percent of the judges serving in office participated in the Program; by 1982, participation had fallen to 79 percent. In 1982, only 25 percent of newly-appointed judges elected to join the system, compared to 74 percent in 1978. Moreover, but for the severe penalties associated with revocation, many judges currently in the Program would probably also withdraw because the Program has become an unattractive investment. The alternative post-death financial protection plans that can be obtained through private financial institutions, such as banks and insurance companies, offer greater returns.

Unfortunately, if the Program remains an unattractive investment option, participation will probably continue to decline. Declining participation not only attests to the Program's inadequacy, it also could damage the Program's actuarial stability. Thus, the objectives and gains envisioned by the Congress and the federal justices through the passage of the 1976 Reform Act will be thwarted. Now, a proposal is under consideration to reform the Judicial Survivors' Annuities Program. The current proposal, specifically Title III of S.645, is substantially similar to reforms recommended by the Judicial Conference two years ago. Based on our review of the proposal, we recommend that all the proposed changes be adopted.

- the linkage of judicial salaries with congressional and high-level executive branch salaries should not stand as a bar to any of these three groups receiving appropriate upward adjustments.
- major revisions should be made in the structure and financing of the judicial survivor annuities program available for federal judges to meet their needs and the needs of their families.

The ABA concurs in these findings and endorses the following report of the Commission on the subject of federal judicial salaries and benefits.

Federal Employment: the Compensation Crisis

For the past several decades numerous governmental Commissions and agencies have warned that Federal salary rates do not adequately compensate public servants. In its 1960 report to the President, the Commission on Executive, Legislative, and Judicial Salaries concluded:

This nation is faced with a quiet crisis in terms of the rapidly increasing problem of attracting and retaining men and women of outstanding ability and achievement to fill the top positions in our government". The principal factors hindering the recruitment and retention of federal employees cited by the Commission are: declining purchasing power, inadequate annual salary and comparability adjustments, and unrealistic salary limitations.

A. Surviving Spouses' Annuities

1. Increase the Annuity Computation Factor from 1.25 Percent to 1.5 Percent

At present, under subsection (1) of 28 U.S.C. § 376, a surviving spouse's annuity is calculated using the following formula:

$$\text{annuity amount} = \left(\frac{\text{high three year}}{\text{average annual salary}} \right) \times (\text{years of service}) \times .0125$$

(Senate Report 94-799 presents a full explanation of the application of that formula, and the manner in which different types of creditable service are used in its application, at pages 32-34.)

Under the proposal, the 1.25 percent annuity computation factor would be replaced by a new factor of 1.5 percent. This constitutes a very conservative adjustment in Program benefits. (To compare the predicted benefits payable under the proposal versus the benefits currently payable, see Charts A and B. The amounts shown in the charts are a direct product of using the average annual salary figures at the top of each column. The amounts shown are those available to a surviving spouse whose annuity commences on or after the date shown at the top of each column.)

Increasing the annuity percentage factor from .0125 to perhaps .0150 or .0200 would be the simplest yet most

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In proposing significant pay raises for certain government officials, the Grace Commission report acknowledges the seeming conflict between its recommendation and its mandate to identify cost savings, revenue, and cash acceleration opportunities. The recommendation to increase salaries obviously will generate added costs; however, as the report stresses, having the right people in government "capable of effective and efficient management of people, projects, time and budgets," will "generate long-term savings and operating efficiencies..." (p. 120).

The Grace Commission's conclusions about the cost of attracting and retaining the highest caliber individual to government service apply equally, if not with greater force, to the federal judiciary. For reasons described below, current compensation policy places federal judges under even greater financial pressure than it does senior executives or even Members of Congress.

Impact on the Federal Judiciary

One of the fundamental precepts of our form of government is the separation of powers between the Executive, Legislative, and Judicial branches. If we are to maintain a government by law and not people, we need to maintain the balance between these separate branches. Essential to that task is the ability of the judiciary to attract capable and committed employees thus ensuring that that branch can function effectively.

fact actually supports the establishment of an even higher ceiling -- of perhaps 50 to 60 percent of the "average annual salary" figure -- because the benefit could be obtained at a very modest cost.

If the ceiling were set at 55 percent, service through 44 years would become creditable under the current Program. Chart-A shows the Annuity Amounts which would be obtained if up to 48 years of service were counted. Very few judges would ever benefit from the change because few would serve the additional number of years. Changing the annuity percentage factor to .0150 (see discussion at item 1, above, and attached Chart B), would result in the elimination of six years of service from creditability if the current 40 percent ceiling were retained. The proposal therefore substitutes a 55 percent ceiling for the existing 40 percent ceiling (at 55 percent, the corresponding service is 36 years, see Chart B).

Establishing a "Floor" for Spousal Annuities -- While an annuity amount ceiling of 40 percent of the "average annual salary" figure is statutorily mandated, no real floor figure is provided. Many judges believe the establishment of a floor to be the most needed reform in the program. It provides an immediate, visible return on investment if death occurs in early years. The Judicial Conference considered floors ranging from 20 to 30 per-

It is an unavoidable fact of civil life that those who accept appointment to government service are generally paid less than they could command in the private sector. The compensation sacrifice currently expected of federal judges, however, is exceptionally harsh. Less than 20 percent of judges surveyed report that they can live on their salary alone. Unlike most appointed officials, judges are not expected to spend a few years in government, after which they can return to lucrative private employment; rather, it is assumed judges will serve for life at their congressionally-authorized salaries. Unlike most government employees, judges are highly restricted in their ability to supplement their income. The judicial code of conduct and federal conflict-of-interest statutes bar judges from the practice of law while serving on the bench. Judges may teach, write and lecture, provided this work does not impinge on the performance of judicial duties and is not inconsistent with those duties. Similarly, investment assets must be carefully scrutinized so as to avoid even the appearance of impropriety.

Finally, relative to the treatment of most federal salaries, judicial pay raises have lagged behind the rest of the government. Since 1969, general schedule employees have received annual pay adjustments in all but one year. During that same period, judicial salary increases were erratic. From March 1969 to September 1975, no increases in judicial salaries were granted by Congress. Between October 1975 and September 1979, Congress approved a single 5 percent cost-of-living

the Civil Service Retirement Systems to permit widowed annuitants who had attained age 60 to retain their survivors' benefits even if they remarry. See Pub. L. No. 95-216 and Pub. L. No. 95-18. Widows who receive benefits under the Program lose them if they remarry. See 28 U.S.C. § 376(h)(2). In 1981, the Judicial Conference assessed the cost of revising 28 U.S.C. § 376 to permit retention of annuity benefits if remarriage were to occur after age 60. The estimated cost was found to be inconsequential. We then recommended that that revision be made and support it again.

B. Surviving Children's Annuities

At present, annuities are authorized for surviving children in amounts that are determined by statutorily designated dollar figures that vary according to whether a surviving spouse is also receiving an annuity. If the spouse is receiving a survivor's annuity under the Program, each child would receive an annuity equal to the lesser of (a) \$1,548 or (b) \$4,644 divided by the number of children. If the spouse is not receiving an annuity under the Program, each child would receive an annuity equal to the lesser of (a) \$1,860 or (b) \$5,580 divided by the number of children, or (c) the amount which a surviving spouse would have received divided by the number of children. If there are more than three children who sur-

Of crucial importance is where this course is leading. According to a recent survey of federal judges, only 93 of 533 respondents reported that they were able to live on their judicial salaries alone. The vast majority of federal judges find it routinely necessary to supplement their judicial salaries. Frequently cited sources of supplemental income are investments, savings, royalties from writings, and teaching salaries. It should also be noted that judges mirror the trend in the general population toward two-income families. However, because of the limitations imposed on a judge's outside income sources, working spouses are becoming a necessity in judicial households. Most judges with working spouses reported that without this the second income it would not have been possible for them to remain on the bench.

If an individual with a family to support cannot exist with security and dignity on the salary of a federal judge, society faces very limited alternatives. To avoid reducing the quality of the federal bench, it may become necessary to fill judicial vacancies only with men and women of independent means, or older persons whose family responsibilities are largely behind them, or persons whose spouses are a substantial source of income in the household. To be limited to only these selection alternatives would be unsatisfactory in view of the importance of maintaining a diversified judiciary and of attracting the most qualified persons to the bench, and in the case of older persons, the length of time a judge might reasonably expect to be active.

C. Preserving the Program's Financial Integrity

The proposed amendments, if adopted, will increase the cost of the Program. The Judicial Conference retained an outside consulting firm to assess the contribution, in terms of percentage of salary, necessary to keep the Program actuarially sound. The review below considers the analysis conducted by the Judicial Conference.

Today, judges who elect to join the Program contribute 4.5 percent of their salaries, and the government "matches" their contributions (see 28 U.S.C. § 376(c)). The Program's income is derived from the two types of contributions and the fund's investment earnings. Actuarial studies indicate that the overall 9 percent contribution rate currently preserves actuarial soundness. Assessments of the potential costs of adding various benefit improvements ranged from 12.16 to 16.72 percent. The first figure would result if a .0150 computation formula factor, a 25 percent floor, and a 50 percent ceiling were created. The second figure would result if a .0200 computation formula factor, a 30 percent floor, and a 60 percent ceiling were created. The following chart shows the costs of specific benefit packages as well as the annual dollar figures for varying contribution percentages for district and circuit judges at presently authorized salary rates:

Moreover, increasing numbers of attorneys of the caliber desired on the federal bench are refusing consideration for appointment. Confronted by this growing problem, both the Carter and Reagan Administrations have publicly warned of serious repercussions for our justice system.

Quadrennial Commission Deliberations

The four Commissions on Executive, Legislative and Judicial Salaries which have been convened since 1969 have all recommended significant salary increases for federal judges. All four of these previous recommendations have been either adjusted downward measurably before congressional action or have been entirely denied by Congress. Obviously, each of the previous Quadrennial Commissions has seen the need and desirability for elevating judicial salaries. Yet the actual compensation level for federal judges today is well below the level recommended in 1980; even without adjusting for inflation.

This Quadrennial Commission, like its predecessors, will receive by the end of its deliberations extensive statistics, charts, graphs, and comparisons documenting the need to increase federal salaries generally, and judicial salaries in particular. The case for higher pay levels for the federal judiciary made repeatedly in the past has yet to be fully recognized by Congress. The Federal Judicial Compensation

arrangement would be appropriate. The Conference also concluded that increasing only slightly judges' contributions and seeking necessary remaining funding from general appropriations would be an appropriate change in the Program. We are in agreement with these conclusions.

Given the current cost of participation in the Program for an individual judge, compared to alternative approaches available from banks and insurance companies and the inadequate compensation of our judges to which we have consistently called attention, modification of the "matching" contribution arrangement is both an equitable and necessary change, and one that could help to reverse declining participation in the Program by newly-appointed judges. Therefore, we support a modest increase in the current contribution rate for judges, from 4.5 to 5.0 percent of annual salary, and a "pay-as-you-go" annual funding arrangement for the government to provide the necessary estimated additional 8.0 percent, an increase of only 3.5 percent over the current required "matching" rate.

The government's obligation to contribute under the proposal the amount annually determined as necessary to maintain the actuarial soundness of the Program clearly establishes an open-ended financial commitment. But it has had that commitment since the Judicial Survivors'

appeals judges, \$90,000; associate justices of the Supreme Court, \$115,000; and the Chief Justice, \$120,000. However, Congress rejected the recommendation and denied any increase. Current federal judicial salaries -- \$76,000 for a district judge, \$80,400 for a circuit judge, \$100,600 for an associate justice and \$104,700 for the Chief Justice -- are substantially below the 1980 recommended levels. Even an increase to the 1980 recommended levels would not catch up with the double-digit rise in the cost-of-living which has occurred since that time.

The FJCC recommendation would use the 1980 Quadrennial Commission recommendation as its base and add to it the percentage adjustments actually granted by Congress to judges in 1981, 1982, 1984 and 1985 under the Executive Cost-of-Living Adjustment Act, Public Law 94-82. Under this formula judicial salaries would be \$99,600 for district court judges, \$105,600 for circuit court judges, \$134,900 for associate justices and \$140,800 for the Chief Justice respectively. This represents an increase over current actual judicial salaries of 31% for district and circuit judges and 34% for the justices of the Supreme Court. This would also reflect an increase over the amounts recommended by the 1980 commission of about 17 percent.

To place current judicial salaries at the same real income level as that recommended by the 1980 Commission, increases of between 45 and 53 percent would be required to compensate fully for the continued erosion of purchasing power due to inflation.

Conclusion

The Federal Judicial Compensation Commission is mindful of the current fiscal constraints under which the federal government must operate and the great temptation to defer all decisions that will increase the budget significantly, and has noted the President's call for a pay cut and freeze of federal salaries. These are difficult times and the government is facing painful choices. However, it is neither good government nor prudent management policy to continue to demand such severe financial sacrifices of federal employees, particularly federal judges.

Increasing judicial salaries to the level recommended by the Federal Judicial Compensation Commission will result in direct increased costs to the government of about \$25 million for salaries and benefits -- a modest amount in an overall federal budget approaching a trillion dollars.

Judicial pay freezes or severely limited salary increases will not result in significant real dollar cost savings or cost avoidances. Nor can the true cost to our nation of such policies be measured solely in dollars. The failure to provide adequate judicial compensation would seriously affect the ability of the government to attract and retain the highest caliber individuals as judges; the efficient, productive and effective management of judicial resources; and the public's confidence in our justice system.

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CHART A
JUDICIAL SERVICES' ANNUITY PAYABLE TO SPOUSES ON AND AFTER DECEMBER 31, 1963
 Computed by Using the High-Three-Year Average Annual Salary
 And a Formula Computation Factor of 3.33 Percent

Years of Service	District Judge				Circuit Judge			
	22-29-32 \$24,927	23-29-33 \$27,457	24-29-34 \$30,166	25-29-35 \$33,000	26-29-37 \$36,000	27-29-42 \$39,200	28-29-44 \$42,600	29-29-45 \$46,100
10*	0 1,306	0 1,353	0 1,370	0 1,370	0 1,380	0 1,430	0 1,469	0 1,469
30*	3,724	3,792	3,827	3,827	3,834	3,895	3,932	3,932
4	3,369	3,464	3,506	3,506	3,510	3,572	3,604	3,604
5	3,366	3,473	3,519	3,519	3,523	3,586	3,618	3,618
6	3,362	3,481	3,529	3,529	3,533	3,596	3,628	3,628
7	3,359	3,479	3,527	3,527	3,531	3,594	3,626	3,626
8	3,356	3,477	3,525	3,525	3,529	3,592	3,624	3,624
9	3,353	3,474	3,522	3,522	3,526	3,589	3,621	3,621
10	3,350	3,471	3,519	3,519	3,523	3,586	3,618	3,618
11	3,347	3,468	3,516	3,516	3,520	3,583	3,615	3,615
12	3,344	3,465	3,513	3,513	3,517	3,580	3,612	3,612
13	3,341	3,462	3,510	3,510	3,514	3,577	3,609	3,609
14	3,338	3,459	3,507	3,507	3,511	3,574	3,606	3,606
15	3,335	3,456	3,504	3,504	3,508	3,571	3,603	3,603
16	3,332	3,453	3,501	3,501	3,505	3,568	3,600	3,600
17	3,329	3,450	3,498	3,498	3,502	3,565	3,597	3,597
18	3,326	3,447	3,495	3,495	3,499	3,562	3,594	3,594
19	3,323	3,444	3,492	3,492	3,496	3,559	3,591	3,591
20	3,320	3,441	3,489	3,489	3,493	3,556	3,588	3,588
21	3,317	3,438	3,486	3,486	3,490	3,553	3,585	3,585
22	3,314	3,435	3,483	3,483	3,487	3,550	3,582	3,582
23	3,311	3,432	3,480	3,480	3,484	3,547	3,579	3,579
24	3,308	3,429	3,477	3,477	3,481	3,544	3,576	3,576
25	3,305	3,426	3,474	3,474	3,478	3,541	3,573	3,573
26	3,302	3,423	3,471	3,471	3,475	3,538	3,570	3,570
27	3,299	3,420	3,468	3,468	3,472	3,535	3,567	3,567
28	3,296	3,417	3,465	3,465	3,469	3,532	3,564	3,564
29	3,293	3,414	3,462	3,462	3,466	3,529	3,561	3,561
30	3,290	3,411	3,459	3,459	3,463	3,526	3,558	3,558
31	3,287	3,408	3,456	3,456	3,460	3,523	3,555	3,555
32	3,284	3,405	3,453	3,453	3,457	3,520	3,552	3,552
33	3,281	3,402	3,450	3,450	3,454	3,517	3,549	3,549
34	3,278	3,399	3,447	3,447	3,451	3,514	3,546	3,546
35	3,275	3,396	3,444	3,444	3,448	3,511	3,543	3,543
36	3,272	3,393	3,441	3,441	3,445	3,508	3,540	3,540
37	3,269	3,390	3,438	3,438	3,442	3,505	3,537	3,537
38	3,266	3,387	3,435	3,435	3,439	3,502	3,534	3,534
39	3,263	3,384	3,432	3,432	3,436	3,499	3,531	3,531
40	3,260	3,381	3,429	3,429	3,433	3,496	3,528	3,528
41	3,257	3,378	3,426	3,426	3,430	3,493	3,525	3,525
42	3,254	3,375	3,423	3,423	3,427	3,490	3,522	3,522
43	3,251	3,372	3,420	3,420	3,424	3,487	3,519	3,519
44	3,248	3,369	3,417	3,417	3,421	3,484	3,516	3,516
45	3,245	3,366	3,414	3,414	3,418	3,481	3,513	3,513
46	3,242	3,363	3,411	3,411	3,415	3,478	3,510	3,510
47	3,239	3,360	3,408	3,408	3,412	3,475	3,507	3,507
48	3,236	3,357	3,405	3,405	3,409	3,472	3,504	3,504

Years of Service	District Judge				Circuit Judge			
	22-29-32 \$24,927	23-29-33 \$27,457	24-29-34 \$30,166	25-29-35 \$33,000	26-29-37 \$36,000	27-29-42 \$39,200	28-29-44 \$42,600	29-29-45 \$46,100
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6	3,362	3,481	3,529	3,529	3,533	3,596	3,628	3,628
7	3,359	3,479	3,527	3,527	3,531	3,594	3,626	3,626
8	3,356	3,477	3,525	3,525	3,529	3,592	3,624	3,624
9	3,353	3,474	3,522	3,522	3,526	3,589	3,621	3,621
10	3,350	3,471	3,519	3,519	3,523	3,586	3,618	3,618
11	3,347	3,468	3,516	3,516	3,520	3,583	3,615	3,615
12	3,344	3,465	3,513	3,513	3,517	3,580	3,612	3,612
13	3,341	3,462	3,510	3,510	3,514	3,577	3,609	3,609
14	3,338	3,459	3,507	3,507	3,511	3,574	3,606	3,606
15	3,335	3,456	3,504	3,504	3,508	3,571	3,603	3,603
16	3,332	3,453	3,501	3,501	3,505	3,568	3,600	3,600
17	3,329	3,450	3,498	3,498	3,502	3,565	3,597	3,597
18	3,326	3,447	3,495	3,495	3,499	3,562	3,594	3,594
19	3,323	3,444	3,492	3,492	3,496	3,559	3,591	3,591
20	3,320	3,441	3,489	3,489	3,493	3,556	3,588	3,588
21	3,317	3,438	3,486	3,486	3,490	3,553	3,585	3,585
22	3,314	3,435	3,483	3,483	3,487	3,550	3,582	3,582
23	3,311	3,432	3,480	3,480	3,484	3,547	3,579	3,579
24	3,308	3,429	3,477	3,477	3,481	3,544	3,576	3,576
25	3,305	3,426	3,474	3,474	3,478	3,541	3,573	3,573
26	3,302	3,423	3,471	3,471	3,475	3,538	3,570	3,570
27	3,299	3,420	3,468	3,468	3,472	3,535	3,567	3,567
28	3,296	3,417	3,465	3,465	3,469	3,532	3,564	3,564
29	3,293	3,414	3,462	3,462	3,466	3,529	3,561	3,561
30	3,290	3,411	3,459	3,459	3,463	3,526	3,558	3,558
31	3,287	3,408	3,456	3,456	3,460	3,523	3,555	3,555
32	3,284	3,405	3,453	3,453	3,457	3,520	3,552	3,552
33	3,281	3,402	3,450	3,450	3,454	3,517	3,549	3,549
34	3,278	3,399	3,447	3,447	3,451	3,514	3,546	3,546
35	3,275	3,396	3,444	3,444	3,448	3,511	3,543	3,543
36	3,272	3,393	3,441	3,441	3,445	3,508	3,540	3,540
37	3,269	3,390	3,438	3,438	3,442	3,505	3,537	3,537
38	3,266	3,387	3,435	3,435	3,439	3,502	3,534	3,534
39	3,263	3,384	3,432	3,432	3,436	3,499	3,531	3,531
40	3,260	3,381	3,429	3,429	3,433	3,496	3,528	3,528
41	3,257	3,378	3,426	3,426	3,430	3,493	3,525	3,525
42	3,254	3,375	3,423	3,423	3,427	3,490	3,522	3,522
43	3,251	3,372	3,420	3,420	3,424	3,487	3,519	3,519
44	3,248	3,369	3,417	3,417	3,421	3,484	3,516	3,516
45	3,245	3,366	3,414	3,414	3,418	3,481	3,513	3,513
46	3,242	3,363	3,411	3,411	3,415	3,478	3,510	3,510
47	3,239	3,360	3,408	3,408	3,412	3,475	3,507	3,507
48	3,236	3,357	3,405	3,405	3,409	3,472	3,504	3,504

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Chevron Corporation
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Honorable Abraham Ribicoff
New York, NY

Dr. Rita Ricardo-Campbell
Senior Fellow
Hoover Institution
Stanford, CA

William H. Seay
Chairman and CEO
Southwestern Life Insurance Co.
Dallas, TX

Paul T. Shultz
Vice President
Towers, Perrin, Forster & Crosby
New York, NY

Leonard Woodcock
Ann Arbor, MI

*Resigned January, 1985.

Circuit Judges Salaries

<u>Year</u>	<u>Actual % Increase Granted General Schedule Employees</u>	<u>Actual % Increase Granted the Federal Judiciary</u>	<u>Actual Judicial Salary</u>	<u>1969 Judicial Salary Adjusted Only by Annual GS % Increases</u>	<u>1980 Quadrennial Commission Recommendations Adjusted by Actual Annual GS % Increase</u>
1969 ¹	9.1	-	33,000	42,500	
1970	6.0	-	42,500	45,400	
1971	5.96	-	42,500	49,200	
1972	10.64	-	42,500	52,100	
1973 ²	4.77	-	42,500	57,600	
1974	5.52	-	42,500	60,400	
1975	5.0	5.0	44,600	71,700	
1976 ³	4.83	4.83	46,800	75,300	
1977 ⁴	7.05	-	61,300	79,000	
1978	5.5	-	61,300	84,500	
1979 ⁵	7.0	7.0	65,600	89,100	
1980 ⁶	9.1	9.1	71,600	91,400	90,000
1981 ^{4,6}	4.8	4.8	75,000	104,100	94,350
1982	4.0	4.0	78,000	109,000	98,100
1983	-	-	78,000	113,400	98,100
1984	4.0	4.0	80,400	118,000	102,000
1985 ⁷	3.5	-	80,400	122,100	105,400

¹ 1968 Quadrennial Commission - recommended 45% increase, 29% granted.

² 1972 Quadrennial Commission - recommended 25% increase, no increase granted.

³ 1976 Quadrennial Commission - recommended 48% increase, 31% granted.

⁴ 1980 Quadrennial Commission - recommended 57% increase, no increase granted.

⁵ *U.S. v. Will*, 449 U.S. 200 (1980) held that Congressional denial of the 4.83% increase (Pub. L. No. 94-440 (1977)) and the 7% increase, Pub. L. No. 96-86 (1979) violated the compensation clause of the Constitution.

⁶ Increase granted federal judges despite statutes withholding funding because the application of these statutes to federal judges would violate compensation clause of the Constitution.

⁷ Granted General Schedule Employees 1/1/85. Withheld from Federal Judges.

<u>Year</u>	<u>Actual % Increase Granted General Schedule Employees</u>	<u>Actual % Increase Granted the Federal Judiciary</u>	<u>Actual Judicial Salary</u>	<u>1969 Judicial Salary Adjusted Only by Annual GS % Increases</u>	<u>1980 Quadrennial Commission Recommendations Adjusted by Actual Annual GS % Increase</u>
1969 ¹	9.1	-	40,000	62,500	
1970	8.0	-	62,500	68,200	
1971	5.96	-	62,500	72,300	
1972	10.64	-	62,500	76,600	
1973 ²	4.77	-	62,500	84,700	
1974	5.52	-	62,500	88,000	
1975	5.0	5.0	62,500	93,700	
1976 ³	4.83	4.83	65,600	98,500	
1977 ³	7.05	-	68,800	103,200	
1978	5.5	-	78,400	110,500	
1979 ⁵	7.0	7.0	78,400	116,700	
1980 ⁶	9.1	9.1	83,900	124,700	
1981 ^{4,6}	4.8	4.8	91,500	135,100	120,000
1982	4.0	4.0	95,900	141,600	125,800
1983	-	-	99,800	147,200	130,800
1984	4.0	4.0	99,800	147,200	130,800
1985 ⁷	3.5	-	104,700	153,100	136,000
			104,700	158,500	140,800

- 1 1968 Quadrennial Commission - Recommended 69% increase; 56% granted.
 2 1972 Quadrennial Commission - Recommended 16% increase; no increase granted.
 3 1976 Quadrennial Commission - Recommended 22% increase; 14% granted.
 4 1980 Quadrennial Commission - Recommended 60% increase; no increase granted.
 5 U.S. v. Will, 449 U.S. 200 (1980) held that Congressional denial of the 4.83% increase, Pub. L. No. 94-440 (1977) and the 7% increase, Pub. L. No. 96-06 (1979) violated the compensation clause of the Constitution.
 6 Increase granted federal judges despite statutes withholding funding because the application of these statutes to federal judges would violate compensation clause of the Constitution.
 7 Granted General Schedule Employees 1/1/85. Withheld from Federal Judges.

APPENDIX III

ADDITIONAL MATERIALS RELATING TO JUDICIAL SURVIVORS ANNUITIES

ZDENA S. LAWRENCE
225 East 57th Street
New York, New York 10022
Tel: (212) 838-3846

July 20, 1981

Honorable Peter W. Rodino, Jr., Chairman
House Judiciary Committee
2137 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

I am a widow of the Federal Judge Charles D. Lawrence who served with distinction for more than thirty years in the United States Customs Court.

I am desperately in need of your help. I note from Public Law 95-216 that was passed December 20, 1977 and effective January 1, 1979 that widowed annuitants after age 60, on Social Security and permitted to marry without losing their Social Security Pension benefits.

In addition to this a Public Law 95-318 that was passed September 28, 1978 for Civil Service Retirement, is, that certain widows of the Federal Service Retirees who forfeited annuities because they remarried before July 18, 1966 can now have their survivors benefit reinstated.

Regretably when the 95th Congress made this change in the current law it failed to consider the predicament of widowed annuitants of the Federal Judges 60 years of age or older who had or were contemplating marriage.

To correct this inequity Congressman Bill Green introduced on March 14, 1979 Bill HR2974 in Congress. After waiting for more than two years Congressman Bill Green introduced on April 10, 1981 Bill HR3217.

I am sure that you will understand how terrible I feel that I can not get married for such a long time, and I can not afford to lose my annuity.

The same reasons justifications and human values which permitted the enactment of Public Law 95-216 and Public Law 95-318, which would support your considering this legislation.

Senator Daniel Patrick Moynihan introduced for the same reasons a Bill in Senate S1403 on June 19, 1981 and Congressman Harold S. Sawyer HR 3909 on June 11, 1981 in Congress.

Please help me by considering these Bills, I would be eternally grateful to you. I am in a most miserable situation, because I am waiting for more than two years already. Anything can happen if you wait for such a long time. It is a terrible existence to be doomed and compelled to be alone after the age of 60 and to lose a last chance in life to be a respectable married woman again.

In the meantime all the Social Securities and Civil Service widows can get married after the age of 60 anytime and not lose their annuities. I always thought that our whole U.S.A constitution is based on equal rights, fairness and equity. How can I believe this now?

Please advise me how to correct this inequity soon, and what can be done in the meantime so that I do not forfeit my annuity upon remarriage because I can not afford to lose my annuity.

I would greatly appreciate your considering these Bills, and replying to my letter at your earliest convenience.

Thanking you for your cooperation and help. With kindest regards.

Very Sincerely Yours,

Zdena S. Lawrence

Zdena S. Lawrence

RESOLUTION OF THE
DISTRICT JUDGES' ASSOCIATION
OF THE SEVENTH CIRCUIT

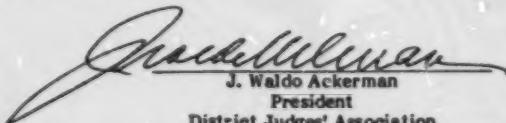
WHEREAS, Congress is considering Senate Bill S. 645 introduced by Senator Robert Dole, which increases the benefits payable to surviving spouses and dependents of deceased judges, and,

WHEREAS the District Judges' Association of the Seventh Circuit has unanimously urged support for this legislation, and,

WHEREAS because of the actuarial unsoundness of the present benefits, some of the members of the District Judges' Association have opted not to participate therein, and,

WHEREAS it is felt that provision should be made that those judges who have not heretofore participated should be permitted to have the opportunity to participate in the event Senate Bill 645 becomes law,

THEREFORE, BE IT RESOLVED that the District Judges' Association of the Seventh Circuit hereby unanimously urges the members of Congress from the States of Illinois, Wisconsin and Indiana, to support Senate Bill 645 and to cause the same to be amended to provide that judges not participating in the present survivors annuity should have the option of participating.



J. Waldo Ackerman
President
District Judges' Association
for the Seventh Circuit

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS
ROOM 319, FEDERAL BUILDING
SPRINGFIELD, ILLINOIS 62705

J. WALDO ACKERMAN
CHIEF JUDGE

October 21, 1983

(217) 482-4340
PTS 933-4340

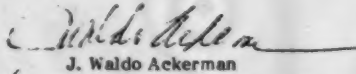
The Honorable Robert W. Kastenmeier
Chairman
House Subcommittee on Courts,
Civil Liberties & The Administration of Justice
House Office Building
Washington, D.C. 20515

Dear Congressman Kastenmeier:

Enclosed is a Resolution which I hope is
self-explanatory.

Anything you can do to help in this regard
will be sincerely appreciated by all of us.

Sincerely,



J. Waldo Ackerman
President
District Judges' Association
of the Seventh Judicial Circuit

JWA/vr
Enclosure

cc: Committee Members Brooks, Mazzoli,
Synar, Schroeder, Glickman, Frank,
Morrison, Berman, Moorhead, Hyde, De-
Wine, Kindness and Sawyer
(With Enclosure.)

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MEMORANDUM

DATE: May 22, 1985

RE: Comparison of Federal Civil Service, Congressional and Judicial Survivors' Annuities Benefits

INTRODUCTION

The purpose of this memorandum is to demonstrate how survivors' benefits, calculated under the Civil Service, Congressional and Judicial Survivors Annuity Programs, compare when applied to various fact patterns. As the following examples illustrate, the greatest inequities occur when an appointee, member, or federal employee dies at an early age with few years of federal service. The Civil Service Program, which includes Congressional benefits, includes a minimum floor on survivors' benefits, thereby shielding the survivors of most employees or members that die at an early age from inadequate benefits. The Judicial Program, however, does not include a minimum floor provision. Consequently, if a federal judge dies at an early age, the benefits accruing to his survivors are totally inadequate. For example, if a member or judge is appointed at age 47 and dies 18 months later at age 48, the spouse of a member of Congress would receive approximately \$9,500 per year. A judge's spouse, on the other hand, would receive slightly less than \$1,500 per year. Without the floor provision, however, the survivor of a member of Congress would receive less than \$1,000. Therefore, enactment of a floor on judicial survivors' benefits would be only putting the program on par with the Congressional Program.

The average age of newly elected members of the House of Representatives in the 99th and 98th Congress was 43. The average age of newly elected members of the Senate in the 99th and 98th Congress was 44 and 47, respectively. The average age of judicial appointees from 1980 to 1984 was 50.5 years. The average age of members

of the House and Senate is 50.5 while the average age of federal judges from 1980 to 1984 was 62. Furthermore, half of the members of the Senate have served for eight years or more and half of the members of the House have served for five years or more. Federal judges serve for an average of 20 years.

The examples used in this memorandum will focus on these statistics and on how the programs differ and harmonize with each other.

FORMULAS

The Judicial Survivors Annuities Program

The prescribed formula for calculating survivors' benefits under the Judicial Survivors Annuity Program is:

$$\begin{array}{l} \text{(high three year average)} \times \text{(years of)} \times .0125 = \text{(annuity)}^{1/} \\ \text{(annual salary)} \quad \quad \quad \text{(service)} \quad \quad \quad \text{(amount)} \end{array}$$

Although the years of service employed in the following hypotheticals will include only judicial service, creditable service also may include other federal employment, such as serving as a member of Congress, a congressional aide, a U.S. Attorney, or military service. The present salary of U.S. District and Circuit Court Judges is \$76,000 and \$80,400, respectively. These figures will be used to determine the average high three year salary of judges. Each example will also assume that appropriate qualifying amounts have been paid into the Judicial Survivors' Annuity Fund and that judges otherwise meet all other requirements of the Act.

^{1/} 28 U.S.C. § 376

Retirement/Survivors Annuity Program for Members of Congress and Federal Employees

If a member of Congress has at least five years of service as a member or Congressional employee, his retirement annuity is calculated pursuant to the following formula:

$$2.5\% \times (\text{high three year average annual salary}) \times (\text{years of service})^{2/} = (\text{retirement annuity})^{3/}$$

If a member has less than five years of service, his retirement annuity is calculated pursuant to the Civil Service annuity formula:

- (1) 1.5% of average pay multiplied by so much of total service that does not exceed 5 years; plus
- (2) 1.75% of average pay multiplied by so much of total service exceeding 5 years but not exceeding 10 years, plus
- (3) 2% of average pay multiplied by total service exceeding 10 years.^{4/}

This formula is also used to calculate the floor on benefits to survivors of members of Congress, serving less than five years, and other federal employees.

^{2/} Although years of service may include other years of federal employment such as creditable military service and Congressional employee service, the calculations in this memo will assume the member has served only in Congress. Furthermore, it will be assumed that all other requirements of the Act, such as payments into the retirement fund, have been complied with.

^{3/} 5 U.S.C. §8339(c)

^{4/} 5 U.S.C. §8339(a)

The annuity accruing to the survivors of members of Congress and federal employees is 55% of the retirement annuity.^{5/} The Civil Service/Congressional Program also contains a formula to calculate minimum survivors' annuities.^{6/} Generally, survivors' annuities are 55% of the retirement annuity of the deceased. If a member or federal employee dies before reaching age 60, however, his survivor receives at least a guaranteed minimum annuity of 55% of the lesser of:

a) 40% of the member's average pay,

or

b) the sum obtained under the basic formula after increasing the length of service by the time between the date of death and the date the member would have reached age 60.

As the following hypotheticals illustrate, this provision accounts for the large difference in benefits payable to the survivors of federal employees (including members of Congress) versus federal judges, when they die at an early age with few years of service.

Members of Congress are currently paid \$75,100 per year and the highest level Senior Executive Service salary is \$72,300. These figures will be employed in the following hypotheticals.

Hypotheticals

Hypothetical No. 1

The average age of newly elected members of the House of Representatives in the 99th and 98th Congress was 43. This age will be used to illustrate the annuity accruing

^{5/} 5 U.S.C. §8341(b)(1)

^{6/} 5 U.S.C. §8341(d)

to the surviving spouse of a new member of Congress or judicial appointee, if he were to die suddenly after serving only 18 months.

Fact Pattern

Elected or appointed at age: 43
Die 18 months later at age: 44
Years of service: 18 months

Members of Congress

Salary: \$75,100

Regular Annuity

$75,100 \times 1.5\% = \$1,126.50 \times 1.5 \text{ years} = \$1,689.75$
Retirement Annuity = \$1,689.75

Survivors' benefits:

55% of retirement annuity (\$1,689.75) = \$929.36 or \$74.45 per month

Floor Amount

Regular annuity (\$929.36)

or

55% of the lesser of:

a) 40% of average high 3 year salary = \$30,040

or

b) Regular retirement annuity projected to the time the member would have reached 60:

60-44 years	= 16 years
+ 1 1/2 years served	= 1.5 years
Total 17.5 years	

$75,100 \times 1.5\% = \$1,126.50 \times 5 \text{ years} = \$5,632.50$

$75,100 \times 1.75\% = \$1,314.25 \times 5 \text{ years} = \$6,571.25$

$75,100 \times 2\% = \$1,502.00 \times 7.5 \text{ years} = \$11,265.00$

Total \$23,468.75

Lesser of:

a) $30,040 \times 55\% = \$16,522 = \$1,376.83 \text{ per month}$

or

b) $23,468.75 \times 55\% = \$12,907.81 = \$1,075.65 \text{ per month}$

The survivors annuity would be \$12,907.81 per year or \$1,075.65 per month, because this amount exceeds the amount (\$929.36 or \$74.45 per month) calculated under the regular formula.

Civil Servants

Salary: \$72,300

Regular Annuity

$72,300 \times 1.5\% = \$1,084.50 \times 1.5 \text{ years of service} = \$1,626.75$
 Retirement Annuity = \$1,626.75

Survivors' Benefits:

55% of retirement annuity (\$1,626.75) = \$894.71 or \$74.55 per month

Floor Amount

Regular annuity (\$894.71)

or

55% of the lesser of:

- a) 40% of average high 3 year salary = \$28,920
- or
- b) Regular retirement annuity projected to the time the employee would have reached 60:

60-44 years = 16 years
 + 1 1/2 years served = 1.5 years
 Total 17.5 years

$72,300 \times 1.5\% = \$1,084.50 \times 5 \text{ years} = \$5,422.50$

$72,300 \times 1.75\% = \$1,265.25 \times 5 \text{ years} = \$6,326.25$

$72,300 \times 2\% = \$1,446.00 \times 7.5 \text{ years} = \$10,845.00$

Total \$22,593.75

Lesser of:

- a) $28,920 \times 55\% = \$15,906.00 = \$1,325.50 \text{ per month}$
- or
- * b) $22,593.75 \times 55\% = \$12,426.56 = \$1,035.55 \text{ per month}$

The survivors' annuity would be \$12,426.56 per year (\$1,035.55 per month), because this amount exceeds the amount (\$894.91 per year or \$74.55 per month) calculated under the regular formula.

Federal Judges

District Court

Salary: \$76,000

$76,000 \times 1.25\% = \$950 \times 1.5 \text{ years of service} = \$1,425$

Annuity = \$1,425 or \$118.75 per month

Circuit Court

Salary: \$80,400

$80,400 \times 1.25\% = \$1,005 \times 1.5 \text{ years of service} = \$1,507.50$

Annuity = \$1,507.50 or \$125.63 per month

Thus in hypothetical number one, where the subject dies at the age of 44 with 18 months of creditable service, his survivor would receive the following annuities:

Members of Congress: \$12,907.81 per year or \$1,075.65 per month

Executive Level

Civil Service: \$12,426.56 per year or \$1,035.55 per month

Judges:

District: \$1,425 per year or \$118.75 per month

Circuit: \$1,507.50 per year or \$125.63 per month

The unequal and totally inadequate compensation for the survivors of federal judges who die at an early age is readily apparent from these figures. The survivors of members of Congress receive almost ten times more than the survivors of federal judges. The figures calculated under the regular Civil Service and Congressional survivors' annuity formula are comparable to those calculated under the Judicial Program. Therefore, the floor on benefits, mandated in the Civil Service Program, accounts totally for the disparity in

benefits. This clear inequity strengthens the case for including a floor in the Judicial Program.

Hypothetical No. 2

The average age of new Members of the Senate was 44 in the 99th Congress and 47 in the 98th. Since the difference between age 43, as illustrated in the first hypothetical, and age 44 is diminutive for our purposes, this example will focus on members who are elected at age 47 and die 18 months later. Thus, this hypothetical will be based on the following figures:

Fact Pattern

Elected or appointed at age: 47
Die 18 months later at age: 48
Years of service: 18 months

Members of Congress

Salary: \$75,100

Regular Annuity

$75,100 \times 1.5\% = \$1,126.50 \times 1.5 \text{ years of service} = \$1,689.75$
Retirement annuity = \$1,689.75

Survivors' Benefits:

55% of \$1,689.75 = \$929.36 or \$77.45 per month

Floor Amount

Regular annuity (\$929.36)

or

55% of the lesser of:

- a) 40% of average 3 years salary = \$30,040
or
- b) Regular retirement annuity projected to time would have reached age 60.

60-48 years = 12 years
+ 1 1/2 years served = 1.5 years
Total 13.5 years

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$$75,100 \times 1.5\% = \$1,126.50 \times 5 \text{ years} = \$5,632.50$$

$$75,100 \times 1.75\% = \$1,314.25 \times 5 \text{ years} = \$6,571.25$$

$$75,100 \times 2\% = \$1,502.00 \times 3.5 \text{ years} = \$5,257.00$$

Total \$17,460.75

Lesser of:

a) $30,040 \times 55\% = \$16,522 = \$1,376.83 \text{ per month}$

or

* b) $17,460.75 \times 55\% = \$9,603.41 = \$800.28 \text{ per month}$

The survivors' annuity would be \$800.28 per month.

Civil Servants

Salary: \$72,300

Regular Annuity

$$72,300 \times 1.5\% = \$1,084.50 \times 1.5 \text{ years of service} = \$1,626.75$$

$$\text{Retirement Annuity} = \$1,626.75$$

Survivors' Benefits:

$$55\% \text{ of retirement annuity } (\$1,626.75) = \$894.71 \text{ or } \$74.55 \text{ per month}$$

Floor Amount

Regular Annuity Amount (\$894.71)

or

55% of the lesser of:

a) $40\% \text{ of average 3 year salary} = \$28,920$

or

b) Regular retirement annuity projected to the time would have reached age 60.

$$60-48 \text{ years} = 12 \text{ years}$$

$$1 \frac{1}{2} \text{ years served} = 1.5 \text{ years}$$

$$\text{Total } 13.5 \text{ years}$$

$$72,300 \times 1.5\% = \$1,084.50 \times 5 \text{ years} = \$5,422.50$$

$$72,300 \times 1.75\% = \$1,265.25 \times 5 \text{ years} = \$6,326.25$$

$$72,300 \times 2\% = \$1,446.00 \times 3.5 \text{ years} = \$5,061.00$$

Total \$16,809.75

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Lesser of:

$$a) 28,920.00 \times 55\% = \$15,906.00 = \$1,325.50 \text{ per month}$$

or

$$b) 16,809.75 \times 55\% = \$9,245.23 = \$770.44 \text{ per month}$$

The survivor's annuity would be \$9,245.23 per year or \$770.44 per month.

In the case of District and Circuit Court Judges, the survivors' annuities would be identical to the amounts calculated in hypothetical No. 1 because formula does not take age into account. Thus, if a 48 year old appointee or member dies with 18 months of creditable service, his survivor would receive:

Members of Congress: \$9,603.41 per year or \$800.28 per month

Executive level

Civil Service: \$9,245.23 per year or \$770.44 per month

Federal Judges:

District Court: \$1,425 per year or \$118 per month

Circuit Court \$1,507.50 per year or \$125.63 per month

Again, the glaring disparities are apparent.

Hypothetical No. 3

Fact Pattern

Elected or appointed at age: 50

Die 5 years later at age: 55

Years of Service: 5 years

Salary: \$75,100

Regular Annuity

$$75,100 \times 2.5\% = \$1,877.50 \times 5 \text{ years of service} = \$9,387.50$$

Retirement Annuity = \$9,387.50

Survivors' Benefits:

$$55\% \text{ of retirement annuity } (\$9,387.50) = \$5,163.13 \text{ or } \$430.26 \text{ per month}$$

Floor Amount

Regular annuity (\$5,163.13)

or

55% of the lesser of:

a) 40% of average high three year salary = \$30,040

or

b) Regular retirement annuity projected to the time the employee would have reached age 60.

60-55 years	= 5 years
+ 5 years served	= 5 years
<u>Total</u>	<u>10 years</u>

 $75,100 \times 2.5\% = \$1,877.50 \times 10 \text{ years} = \$18,775.00$ a) $30,040 \times 55\% = \$16,522 = \$1,376.83 \text{ per month}$

or

• b) $18,775.00 \times 55\% = \$10,326.25 \text{ or } \$860.52 \text{ per month}$

Since the amount calculated under the floor amount formula exceeds the regular annuity of \$5,163.13 (\$430.26 per month), the annuitant would receive the floor amount of \$10,326.25 per year or \$860.52 per month.

Civil Servants

Salary: \$72,300

Regular Annuity
 $72,300 \times 1.5\% = \$1,084.50 \times 5 \text{ years of service} = \$5,422.50$
 Retirement Annuity = \$5,422.50

Survivors' Benefits:

55% of retirement annuity (\$5,422.50) = \$2,982.38 or \$248.53 per month

Floor Amount

Regular annuity (\$2,982.38)

or

55% of the lesser of:

- a) 40% of average high 3 year salary = \$28,920
or
b) Regular retirement annuity projected to time employee would have reach 60.

60-55 years	=	5 years
+ 5 years served	=	5 years
		Total = 10 years

$$72,300 \times 1.5\% = \$1,084.50 \times 5 = \$5,422.50$$

$$72,300 \times 1.75\% = \$1,265.25 \times 5 = \$6,326.25$$

$$\text{Total} = \$11,748.75$$

Lesser of:

a) $28,920 \times 55\% = \$15,906 = \$1,325.50$ per month

or

* b) $11,748.75 \times 55\% = \$6,461.82 = \$538.48$ per month

Since the annuity calculated under the floor formula yields a higher annuity, the survivor would receive \$6,140.06 a year or \$511.67 per month.

Judges

District Court

Salary: \$76,000

$$76,000 \times 1.25\% = \$950 \times 5 \text{ years of service} = \$4,750$$

The survivors annuity is \$4,750 per year or \$395.83 per month.

Circuit Court

Salary: \$80,400 per year

$$80,400 \times 1.25\% = \$1,005 \times 5 \text{ years of service} = \$5,025$$

The survivors annuity is \$5,025 per year or \$418 per month.

Thus, in case number 3, where the subject dies at age 55 with 5 years of service, survivors receive the following annuities:

Members of Congress: \$10,325.25 per year or \$860.52 per month

Executive Level
Civil Servants: \$6,461.82 per year or \$538.48 per month

Judges

District: \$4,750 per year or \$395.83 per month
Circuit: \$5,025 per year or \$418 per month

After five years of service, the survivors of Members of Congress and federal employees still receive much higher annuities than the survivors of Federal Judges. In this case, the disparities are narrower; the survivor of a Congressman would receive more than twice as much as the survivor of a federal judge rather than almost ten times as much. Given the ability of members of Congress to obtain outside income and their wider discretion to engage in outside income ventures and investments, it is untenable for the survivors of Federal Judges who are likely to have less income at their disposal, to be receiving fewer benefits. It is even more objectionable for them to be receiving less than half as much as the survivors of members of Congress, per year.

Hypothetical No. 4

Fact Pattern

Elected or appointed at age: 45
Die 10 years later at age: 55
Years of service: 10 Years

Member of Congress

Salary: \$75,100

Regular Annuity

$75,100 \times 2.5\% = \$1,877.50 \times 10 \text{ years} = \$18,775.00$
Retirement Annuity = \$18,775.00

Survivors' Benefits:

55% of retirement annuity (\$18,775.00) = \$10,326.25 or \$860.52 per month

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Floor Amount

Regular annuity (\$10,326.25)

or

55% of the lesser of:

a) 40% of the average high three year salary = \$30,040

or

b) Regular retirement annuity projected to the time the member would have reached 60:

60-55 years	=	5 years
+ 10 years served	=	10 years
<u>Total</u>		<u>15 years</u>

 $75,100 \times 2.5\% = \$1,877.50 \times 15 \text{ years} = \$28,162.50$

Lesser of:

a) $30,040 \times 55\% = \$16,522 = \$1,376.83$ per month

or

* b) $28,162.50 \times 55\% = \$15,489.38 = \$1,290.78$ per month

The survivors' annuity would be \$15,489.38 per year or \$1,290.78 per month because this amount exceeds the amount calculated under the regular formula.

Civil Servants

Salary: \$72,300

Regular Annuity
 $72,300 \times 1.5\% = \$1,084.50 \times 5 \text{ years} = \$5,422.50$
 $72,300 \times 1.75\% = \$1,265.25 \times 5 \text{ years} = \$6,326.25$

Total	\$11,748.75
-------	-------------

Retirement Annuity = \$11,748.75

Survivors' Benefits:

55% of retirement annuity (\$11,748.75) = \$6,461.81 or \$538.48 per month

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Floor Amount

Regular annuity (\$6,461.81)

or

55% of the lessor of:

- a) 40% of the average high three year salary = \$28,920 .
 or
 b) Regular retirement annuity projected to the time the employee would have reached 60:

60-55 years = 5 years
 + 10 years served = 10 years
 Total 15 years

$72,300 \times 1.5\% = \$1,084.50 \times 5 \text{ years} = \$5,422.50$

$72,300 \times 1.75\% = \$1,265.25 \times 5 \text{ years} = \$6,326.25$

$72,300 \times 2\% = \$1,446.00 \times 5 \text{ years} = \$7,230.00$

Total \$18,978.75

Lessor of:

- a) $28,920 \times 55\% = \$15,906.00 = \$1,325.50 \text{ per month}$

or

- * b) $18,978.75 \times 55\% = \$10,438.31 \text{ or } \$869.86 \text{ per month}$

The survivors annuity would be \$10,438.31 per year or \$869.86 per month because this amount exceeds the amount calculated under the regular formula.

Federal JudgesDistrict Court

Salary: \$76,000

$76,000 \times 1.25\% = \$950 \times 10 \text{ years of service} = \$9,500$

Annuity = \$9,500 or \$791.67 per month

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Circuit Court

Salary: \$80,400

$80,400 \times 1.25\% = \$1,005 \times 10 \text{ years of service} = \$10,050 \text{ or } \$837.50 \text{ per month}$

Annuity = \$10,050 or \$837.50 per month

Thus in hypothetical number four, where the appointee or member dies at age 55 with 10

years of creditable service, his survivor would receive the following:

Members of Congress: \$15,489.38 per year or \$1,290.78 per month

Executive Level

Civil Servants: \$10,438.31 per year or \$869.86 per month

Judges

District: \$9,500 or \$791.67 per month

Circuit: \$10,050 or \$837.50 per month

Hypothetical No. 5Fact Pattern

Elected or appointed at age: 45

Dies 20 years later at age: 65

Years of service: 20 years

Members of Congress

Salary: \$75,100

Regular Annuity

$75,100 \times 2.5\% = \$1,877.50 \times 20 \text{ years} = \$37,550$

Retirement annuity = \$37,550

Survivors' Benefits:

55% of retirement annuity (\$37,550) = \$20,652.50 or \$1,721.04 per month

Since the member expires at age 65, the floor formula is inapplicable.

Civil Servants

Salary: \$72,300

Regular Annuity

$$72,300 \times 1.5\% = \$1,084.50 \times 5 \text{ years} = \$5,422.50$$

$$72,300 \times 1.75\% = \$1,265.25 \times 5 \text{ years} = \$6,326.50$$

$$72,300 \times 2\% = \$1,446.00 \times 10 \text{ years} = \$14,460.00$$

$$\text{Total} \quad \$26,209.00$$

Retirement Annuity = \$26,209

Survivors' Benefits:

55% of retirement annuity (\$26,209) = \$14,414.95 or \$1,201.24 per month

Federal JudgesDistrict Court

Salary: \$76,100

$$76,100 \times 1.25\% = \$950 \times 20 \text{ years of service} = \$19,000 \text{ or } \$1,583.33 \text{ per month}$$

Annuity = \$19,000 or \$1,583.33 per month

Circuit Court

Salary: \$80,400

$$80,400 \times 1.25\% = \$1,005 \times 20 \text{ years of service} = \$20,100 \text{ or } \$1,675.00 \text{ per month}$$

Annuity = \$20,100 or \$1,675.00 per month

Thus in hypothetical number five, where the subject dies at age of 65 with 20 years of creditable service, his survivor would receive:

Member of Congress: \$20,652.50 or \$1,721.04 per month

Executive Level

Civil Service: \$14,414.95 or \$1,201.24 per month

Judges

District: \$19,000 per year or \$1,583.33 per month

Circuit: \$20,100 per year or \$1,675.00 per month

Hypotheticals four and five illustrate that the formulas begin to approach parity only when the member or appointee begins to approach retirement age. Before that time, the floor formula insures that the benefits

accruing to the survivors of members of Congress will always far outdistance benefits payable to the survivors of federal judges.

Proposed Amendments

Amendments to the Judicial Survivors Annuity Program, proposed by Congressman Kastenmeier, would alter the program in fundamental ways. Judges would contribute an additional .5% of their salaries to the fund and the formula would substitute a factor of 1.5% for the 1.25% of average salary currently contained in the law. Furthermore, there would be a floor of 30% of average high three year judicial salaries. on all annuities.

At current salary levels, a 30% floor would yield annuities of \$22,800 and \$24,120, respectively, for the spouses of District and Circuit Judges. These amounts are equivalent to serving 24 years, under the present formula. A 20% floor would yield annuities of \$15,200 for the survivors of District Judges and \$16,080 for the survivors of Circuit Judges. These amounts are equivalent to serving 16 years, under the present formula. A floor of 25% would yield an annuity of \$19,000 for the survivors of District Judges and \$20,100 for the survivors of Circuit Judges. These amounts would be equivalent to 20 years of service.

The annuity generated pursuant to a 30% floor substantially exceeds the floor amounts in the Congressional and Civil Service Programs. The maximum amount under the Congressional/Civil Service floor formula is 55% of 40% of average three year high salaries. Thus, for members of Congress the maximum floor amount is \$16,522 per year or \$1,376.83 per month and for top executive level civil servants \$15,906.00 per year or \$1,325.50 per month. The 20% floor yields amounts comparable to the Civil Service/Congressional scheme. The 25% floor, however, does not substantially exceed the Congressional

Program and may be necessary given the potentially more acute needs of their survivors due to the limits on outside income and investments imposed on Federal Judges.

Substituting 1.5% for 1.25% also favorably changes the formula. For instance, in hypothetical number three where an appointee to the Court of Appeals serves for 5 years, the survivors' benefits would be:

$$\$80,400 \times 1.50\% = \$1,206 \times 5 \text{ years of service} = \$6,030$$

Under the present formula the annuitant would receive only \$5,025 per year. This change does not substantially alter the situation of the survivor of an appointee who dies after 18 months in office. In that case the annuity is calculated as follows:

$$80,400 \times 1.50\% = \$1,260.00 \times 1.5 \text{ years} = \$1,890 \text{ per year}$$

This annuity does not differ markedly from the annuity available under the present program, which is \$1,425 per year. Thus increasing the percentage to 1.5% does not obviate the need for minimum benefits; it will insure, however, somewhat higher benefits for all annuitants.

Childrens' Benefits

Benefits for the children of federal employees or members who die after completing at least 18 months of service are computed pursuant to the following formula:

If the member is survived by a spouse, each surviving child is entitled to an annuity equal to the smallest of:

- a) 60% of the average pay of the employee or member divided by the number of children;
- b) \$900; or
- c) \$2,700 divided by the number of children.

If the employee or member is not survived by a spouse, each surviving child is entitled to an annuity equal to the smallest of:

- a) 75% of the average pay of the employee or member divided by the number of children;
- b) \$1,080; or
- c) \$3,240 divided by the number of children.

Benefits for the children of judges who die with minor children are actually more generous than those under the Congressional/Civil Service Program and are calculated pursuant to the following formula:

If the judge is survived by a spouse each child receives an annuity equal to:

- a) \$1,548; or
- b) \$4,644 divided by the number of children
whichever is smallest.

If the judge leaves no surviving spouse each child receives:

- a) \$1,850; or
- b) \$5,550 divided by the number of children
whichever is smallest.

The Eastermeier bill would amend the Judicial Program to provide much more generous benefits for surviving children. Such children would receive benefits based on the following formula:

If the judge is survived by a spouse, surviving children would receive the smaller of:

- a) 10% of high average three year salary
or
- b) 20% of high average three year salary divided by the number of children.

If the judge leaves no surviving spouse, surviving children would receive:

- a) 20% of high average three year salary
or

- b) 40% of high average three year salary divided by the number of children.

Ten percent of the current salary of District Judges is \$7,600 and 20% is \$15,200. Thus, if a judge expires leaving a spouse and 2 children, each child would receive \$7,600 per year or \$633.33 per month. If the judge leaves three children, each child would receive \$5,066 or \$422.16 per month. If the judge died, leaving no surviving spouse and two surviving children each child would receive \$15,200 or \$1,266 per month. If the judge was survived only by three children each child would receive \$10,133 each or \$844.44 per month.

If a member of Congress died and was survived by a spouse and two children, each child would received \$900 per year or \$75.00 per month. If the member was survived by 3 children, each child would still receive \$900 per year. If the member was not survived by a spouse, 2 children would received \$1,080 each per year, and 3 children would also each receive \$1,080 per year.

Presently the the floor on benefits in the Civil Service/Congressional Program more than compensate for the slightly higher benefit to the surviving children of federal judges. Under the entire package of amendments to the Judicial Survivors Annuity Program, however, the benefits payable to the surviving children of judges would far outpace those payable to the surviving children of members of Congress. As of March 1, 1955, there were only ten children receiving benefits under the judicial program. Thus the cost of this program, even with more generous benefits, will be minimal and the need is very likely to be more acute.

United States District Court
Central District of California
United States Courthouse
Los Angeles, California 90012

Chambers of
Laughlin E. Waters
United States District Judge

October 7, 1985

Telephone
(213) 686-2000
FAX 799-2000

Honorable Robert W. Kastenmeier
Member of the House
2232 Rayburn House Office Building
Washington, D.C. 20515

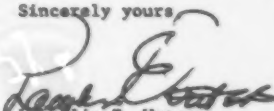
Dear Representative Kastenmeier:

I have just received a copy of your bill which is presently unnumbered, but which I am informed recently came out of a subcommittee. It is entitled "To amend title 28, United States Code, to reform and improve the Federal justices and judges survivors' annuities program, and for other purposes."

I am delighted to see that this measure is moving forward and express my personal appreciation.

If there is anything I can do to help advance the progress of this bill, please let me know.

Sincerely yours


Laughlin E. Waters
United States District Judge

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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

SEP 26 1985

B-220346

The Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts,
Civil Liberties, and the
Administration of Justice
Committee on the Judiciary
House of Representatives

Dear Mr. Chairman:

The purpose of this letter is to comment on a bill being considered by your subcommittee--H.R. 3081, a bill to amend 28 U.S.C. 376, in order to reform and improve the existing program for annuities for survivors of federal justices and judges. We are commenting because the bill provides a new responsibility for the Comptroller General: that he determine annually the unfunded liability of the Judicial Survivors' Annuities Fund. We oppose this new responsibility because it is inconsistent with the Comptroller General's present authority to audit federal pension plans in accordance with 31 U.S.C. 9503.

Under the provisions of 28 U.S.C. 376, annuities are provided for survivors of certain judicial officials of the United States from the Judicial Survivors' Annuities Fund. Judicial officials who are covered by the plan make contributions in the amount of 4.5 percent of salary. The survivors' fund also receives matching contributions from a fund used to pay the compensation of the judicial officials and interest on investments.

The Judicial Survivors' Annuities Fund, along with other federal pension plans, is also subject to the provisions of 31 U.S.C. 9501-9504, which requires it to submit annual reports to the Congress and the Comptroller General disclosing the financial status of the plan. Section 9503 provides for the Comptroller General to issue instructions for the judicial plans to follow in preparing the annual reports. To comply with the legislation and the instructions, the plan must make certain actuarial computations estimating the unfunded liability and other projections. The report must also include the opinion of an enrolled actuary stating that the actuarial assumptions are reasonably related to plan experiences and expectations and represent the actuary's best estimate of anticipated experience under the plan, and that the report is complete and accurate. Subsection (a)(5) of 31 U.S.C. 9503 also provides that when the Comptroller General deems it appropriate, he shall perform audits of the reports required to be filed by the federal pension plans.

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B-220346

Section 2 of the proposed legislation would change the government's annual contribution from a matching contribution to an annual amount required to reduce to zero the unfunded liability. It also provides that the Comptroller General shall annually determine the unfunded liability, as defined in the bill, using the information contained in the plan's report filed pursuant to 31 U.S.C. 9503. We believe that it would be inappropriate for the Comptroller General to determine the unfunded liability, in that such participation would be inconsistent with the concepts of independence and objectivity implicit in any of our audits of the Judicial Survivors' Annuities Fund under 31 U.S.C. 9503. Accordingly, we urge that the reference therein to the Comptroller General be deleted.

The Senate companion bill, S. 1392, does not require the Comptroller General to compute the amount of the government's contribution. Rather, in section 2, it provides for the contribution to be determined annually in accordance with procedures prescribed by the Comptroller General under the provisions of 31 U.S.C. 9501-9504. We favor the Senate bill's provision in that it retains the plan's current responsibility for determining actuarial amounts, rather than involving the Comptroller General. This allows the Comptroller General to maintain independence in audits of the Judicial Survivors' Annuities Fund.

We appreciate the opportunity to comment on H.R. 3081. Should you have any questions or comments, please contact Mr. Robert W. Gramling of my staff on 275-9400 to arrange a meeting.

Sincerely yours,

for T. A. Holt
Comptroller General
of the United States

cc: The Honorable Peter W. Rodino, Jr.
Chairman, House Committee on the
Judiciary

The Honorable Strom Thurmond
Chairman, Senate Committee on the
Judiciary

The Honorable John P. East
Chairman, Subcommittee on Courts
Senate Committee on the Judiciary

United States District Court

Central District of California
United States Courthouse
Los Angeles, California 90012

Members of
A. Wallace Tashima
United States District Judge

November 4, 1985

Telephone
(213) 894-4283

Hon. Robert W. Kastenmeier
Member of Congress
House of Representatives
Washington, D.C. 20515

Re: H.R. 3081

Dear Congressman Kastenmeier:

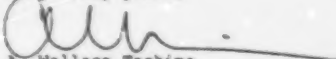
I understand that the referenced bill, relating to "Judicial Survivors Annuities," was recently reported out of Subcommittee to the full House Judiciary Committee as part of a consolidated bill (covering a number of subjects). I do not know the number of the consolidated bill.

Although your bill contains an "opt out" provision, it does not contain an "opt in" or "open season" provision for judges who presently are not members of the Annuities Fund. A number of federal judges did not become members of the fund for precisely the reasons you have introduced your bill--because present annuity levels are so low that prudence dictates alternate means of spousal protection. I suggest that fairness would call for an opportunity for those judges to "opt in" on an equitable basis.

I first raised this subject with Judge Irving Kaufman four years ago when he was chairman of the Judicial Conference's Committee on the Judicial Branch. A copy of my letter to him of October 7, 1981, is enclosed. I was then given to understand that that committee was favorably inclined in support of my suggestion.

I appreciate your efforts and am ready to answer any questions which you may have.

Very truly yours,


A. Wallace Tashima

Hon. Frank M. Coffin

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United States District Court
 Central District of California
 United States Courthouse
 Los Angeles, California 90012

Chambers of
 A. Wallace Cashman
 United States District Judge

October 7, 1981

Teletype
 (213) 688-1283

Hon. Irving R. Kaufman
 United States Court of Appeals
 United States Courthouse
 Foley Square
 New York, New York 10007

Re: H.R. 3909/S. 1403

Dear Judge Kaufman:

We are writing to you as the Chairman of the Committee on the Judicial Branch and to the members of the Committee at the suggestion of Chief Judge Emeritus Hill of our Court.

Upon receipt and review of your August 10th communication to All Federal Judges on this subject, we were surprised and disappointed to learn of what we consider to be an important omission from the bills proposing the Judicial Survivors' Annuities Reform Act of 1981. Although your letter refers to section 4 of the Act as incorporating an "open season", it is, in fact, not a true open season provision in that judges who are not members of the current system are not given the option of joining the reformed system.

We are fairly new judges (two years and one year tenure, respectively) who elected not to join the current system for precisely the same reason that your Committee concluded that reform was essential. From our conversations with other new judges, we believe that there are a number of others who are in the same position.

We ask that your Committee recommend that the bills be amended to provide for a true "open season" to grant those judges not now members of the outmoded system the option to join the reformed system. Without suggesting specific language, we believe this could easily be accomplished by amendment to section 4. Appropriate conditions and safeguards should, of course, be included in such an amendment, such as requiring back contributions with interest and a limitation period to the opt-in open season. If these safeguards are

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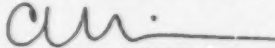
built in, the additional cost to the government of including new opt-in judges in the proposed Act should not exceed the cost per judge projected for judges who are members of the current system.

We look forward to hearing from you of your Committee's recommendation and action and trust that they will be favorable.

Sincerely yours,


TERRY J. HATTER, JR.

United States District Judge



A. WALLACE TASHIMA
United States District Judge

cc: All Members of the
Committee on the
Judicial Branch

AWT:nrr

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UNITED STATES HOUSE OF REPRESENTATIVES
 COMMITTEE ON THE DISTRICT OF COLUMBIA
 1315 LONGWORTH HOUSE OFFICE BUILDING
 WASHINGTON, D.C. 20515
 ESTABLISHED 27 JANUARY 1939

EDWARD C. SPENCER, JR., STAFF DIRECTOR
 JOHN GRUBBS, SECURITY STAFF DIRECTOR

TELEPHONE 225-4457

U.S. House of Representatives
Committee on the District of Columbia

ESTABLISHED 27 JANUARY 1939

Room 1315, Longworth House Office Building
 Washington, DC 20515

December 10, 1985

The Honorable Robert W. Kastenmeier, Chairman
 Subcommittee on Courts, Civil Liberties, and the
 Administration of Justice
 2137 Rayburn House Office Building
 Washington, D.C. 20515

Dear Mr. Chairman:

I understand the House Committee on the Judiciary recently reported a bill, H.R. 3570, to amend Title 28, United States Code, to reform and improve the federal justices and judges survivors annuities program. I also understand that when this bill comes before the House, you are interested in amending Title 11, District of Columbia Code, to revise the District of Columbia Code, to improve the District of Columbia Judges survivors annuities program.

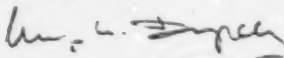
Generally, this amendment would increase annuity benefits to which surviving spouses and children would be entitled. Specifically, this provision would require local judges to increase their rate of contribution from 3% of their annual salary to 3.5%. Spousal and survivors benefits currently fixed to judges' salaries upon retirement would become fixed to the retirees' annuity at the time of death. Moreover, specific amounts for children would be increased and would be more in tune with today's cost of living.

Additionally, since the beginning of this session of Congress, our staffs have entertained an ongoing discussion regarding filing fees for the United States District Court for the District of Columbia. I have been kept informed of these discussions and corresponding legislative developments. In this instance, I understand that the proposed fee increase for the federal trial court in the District of Columbia would make its fee structure consistent with that of federal District courts throughout the country.

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Given this background, I fully endorse both of these proposed amendments. Further, I take this opportunity to commend you for your efforts and for keeping the Committee on the District of Columbia abreast of pertinent legislative developments. If I can be of any assistance, please don't hesitate to contact me.

Sincerely,



MERVYN M. DYMALLY
Chairman, Subcommittee on
Judiciary and Education

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JUDICIAL SURVIVORS' ANNUITIES SYSTEM

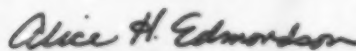
ACTUARIAL REPORT FOR YEAR ENDING
DECEMBER 31, 1983

Prepared by:

EDWARD H. FRIEND & COMPANY
A Division of Johnson & Higgins
of Washington, D.C., Inc.



Kevin P. Counihan
Associate of the Society of Actuaries



Alice H. Edmondson
Associate of the Society of Actuaries



Peter D. Varno
Enrolled Actuary

June 3, 1984
Washington, D.C.

EDWARD H. FRIEND & COMPANY
A Division of Johnson & Higgins of Washington, D.C., Inc.

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JUDICIAL SURVIVORS' ANNUITIES SYSTEM

Actuarial Report for Year Ending
December 31, 1983

A. Purpose

The purpose of this report is to comply with the requirements of Public Law 95-595 in accordance with the instructions provided by the United States General Accounting Office.

The report consists of a brief overview and summary, followed by the general information statement, a summary of principal plan provisions, a summary of funding methods, factors and assumptions used in the actuarial determinations, and the six tables required by the instructions provided.

B. General Considerations

The Judicial Survivors' Annuities System provides death benefit coverage throughout the lifetime of judicial officials of the U.S. who elect, within six months of taking office, to be covered by the plan and to contribute 4 1/2% of compensation earned each pay period (U.S. Code paragraph 376).

In determining the amount of the death benefit, credit is given to service rendered not only as a judge or justice, but also in a congressional, military or executive branch employee capacity. The participant is required to make contributions only for 18 months of any service rendered prior to his coverage under the plan. Upon death, however, 10% of that portion of the amount the participant should have contributed for all prior service which was not contributed is deducted from the survivor benefit.

The Judicial Survivors' Annuities System also includes provision for optional coverage to the Director of the Administrative Office of the U.S. Courts, the Director of the Federal Judicial Center, and the Administrative Assistant to the

- 1 -

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Chief Justice of the Supreme Court. These officials may instead, however, elect coverage under the Civil Service Retirement System, in which case the provisions of this plan do not apply. Presently, only the Administrative Assistant to the Chief Justice is covered under the Judicial Survivors' Annuities System. It is assumed for valuation purposes that in the future the same will hold true.

The instructions for preparing this report specified that the assumed future rate of inflation should be 5%. A 7% annual rate of return on invested assets and a 5 1/2% annual rate of salary increase for active judges is assumed in conjunction with the specified rate of inflation and is considered appropriate for use in determining the pre-funding contribution requirements. The investment return assumption implies a real rate of return equal to 2% and the salary increase assumption includes a 5% cost-of-living increase component, plus a 1/2% general productivity increase component. No merit increase component was included since judicial officials are assumed to already be at the height of their career and all receive equal salaries.

No member of the participant group is assumed to resign from office, either before or after retirement.

C. Summary of Conclusions

For 1983, total contributions equal to 9.16% of payroll were made to the Judicial Survivors' Annuities System. These represent scheduled employer/employee contributions (at the combined rate of 9.00%) and contributions for buyback of prior service, the total expressed as a percentage of year-end participant payroll.

Based on the results of this valuation, there was no unfunded actuarial accrued liability as of December 31, 1983, and the 9.16% of payroll contribution made for 1983 exceeded the 7.96% of payroll contribution necessary to fund the 1983 normal cost.

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A Division of JOHNSON & HIGGINS OF WASHINGTON, D.C. Inc.

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The comparison of calculated contributions and actual contributions over the past few years (excluding any direct appropriation amounts) indicates a continuation of the favorable plan experience which began during 1982.

The principal economic and demographic factors which impact on plan costs are the annual rate of salary increase, the annual rate of investment return and the annual rate of mortality. There were no salary increases in 1983 for judicial officials (except for the few officials who were elevated to a higher status). The assumed annual rate of salary increase for valuation purposes is 5 1/2%. As such, the plan experienced gains resulting from the difference between actual and anticipated salary increases. In addition, fewer active participants died than anticipated, while the release in accrued liability attributable to survivor annuitants who died (or otherwise ceased to be eligible) exceeded the expected amount of release, providing a second source of experience gain.

Partially offsetting the gains were experience losses attributable to a 1983 rate of investment return (on a market value basis) of approximately 1.3%, which is below the assumed 7% rate of return. The investment results reflect a depreciation in the market value of the fund's fixed income investments over the period from December 31, 1982 to December 31, 1983, corresponding to an increase in long-term interest rates during that same period. It is noted that plan assets are almost entirely in fixed income investments. If the securities are held to maturity their market values should increase, thereby reversing the current investment losses.

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JUDICIAL SURVIVORS' ANNUITIES SYSTEMActuarial Report for Year Ending
December 31, 1963Statement of General Information

1. Name of plan	Judicial Survivors' Annuities System
2. Name and address of plan sponsor	Administrative Office of the United States Courts The Federal Judiciary Export-Import Bank Building 611 Vermont Avenue, N.W. Washington, D. C. 20005
3. Name and phone number of plan administrator	Mr. Edward V. Garabedian Administrative Office of the United States Courts (202) 633-6101
4. Type of plan entity	Single-employer plan
5. Date plan established	August 3, 1956
6. Plan participants at end of plan year	
(a) Active Participants *	676
(b) Survivor Annuities	
(i) Spouses	200
(ii) Dependent Children	9
(iii) Total	209
(c) Total	885
7. Type of Plan	Defined benefit

* Includes judges and justices in active status, as well as those retired under U.S. Code paragraphs 371(a) (age retirement and resignation), 371(b) (age retirement to senior status), 372(a) (disability retirement), and 373 (age retirement for territorial judges). All of the above continue to contribute to the survivors' plan.

- 4 -

Source: H. FORD & COMPANY

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8. In this plan year, the plan was not merged or consolidated into another plan, nor were assets or liabilities transferred to another plan.

9. Funding arrangement Designated fund

10. Date of most recent actuarial valuation December 31, 1983

11. Actuarial cost method used in completing Tables 4 and 5 Aggregate Actuarial Cost Method

12. Actuarial assumptions

(a) Economic

(i) Rate of return on plan investments 7% per annum

(ii) Ratio of salary expected at Age 70 to salary at

	Men	Women
Age 25	1113%	1113%
Age 40	496	496
Age 55	223	223

(b) Decrements

(i) Basis of mortality assumptions 1971 Group Annuity Mortality Tables for Males and Females

(ii) Normal Retirement Age N.A.

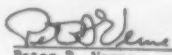
Lowest age at which employees may voluntarily retire with full benefits N.A.

(iii) Basis of withdrawal assumptions None

13. A summary of plan provisions is attached.

The values which have been determined for this report are based on actuarial assumptions which, in the opinion of the actuary, are appropriate for the purposes of the Statement, are reasonable in the aggregate (taking into account the experience of the plan and reasonable expectations), and, when applied in combination, represent his best estimate of the measure of anticipated experience under the plan.

I declare that I have examined this report, including accompanying tables and statements, and to the best of my knowledge and belief it is true, correct, and complete.

 6/6/84
 Peter D. Verne Date
 Vice President
 Edward H. Friend & Company
 1800 K Street, N.W., Suite 500
 Washington, D. C. 20006
 (202) 785-9080

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JUDICIAL SURVIVOR'S ANNUITIES SYSTEMActuarial Report for Year Ending
December 31, 1963Principal Plan Provisions

1. Effective Date: August 3, 1954.
2. Plan Year: The plan year is the calendar year.
3. Participation: Any judge or justice of the United States, including its territories and possessions, the Director of the Administrative Office of the U.S. Courts, the Director of the Federal Judicial Center, and the Administrative Assistant to the Chief Justice of the Supreme Court is eligible to participate. Election to do so must be made within six months of appointment to office, and such election is irrevocable.
4. Contributions:
 - (a) Employee: A participant contributes 4 1/2% of salary, if in active status, or of retirement income, if on age or disability retirement. For judicial service rendered prior to inception of the plan, and for certain periods of prior non-judicial government service, a participant may also deposit 4 1/2% of salary earned during those periods, together with interest at the rate of 3% per year after December 31, 1947 and 4% per year prior thereto. No deposits are required for military service.
 - (b) Employer: The U.S. Government makes matching contributions of 4 1/2% of total participant compensation each pay period.
5. Creditable Service: Service creditable for purposes of determining the survivor benefit includes all judicial and congressional service, certain military service, and certain other service.

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with the executive branch of the Federal government.

6. Average Compensation:

Average compensation is the highest three year average of judicial compensation prior to death.

7. Survivor Benefits:

(a) Spouse Annuity:

(i) Eligibility:

The surviving spouse of a judicial official who dies after serving at least 18 months and who was married at least one year prior to death will receive a benefit payable for life or until remarriage.

(ii) Amount:

The annual amount of the annuity is equal to $1\frac{1}{4}\%$ of average compensation for each year of creditable service, excluding service in the executive branch which exceeds 15 years or military service which exceeds 3 years, plus $\frac{3}{4}\%$ of average compensation for service in the executive branch which exceeds 15 years.

The annuity may not exceed 40% of average compensation and is reduced by 10% of any portion of the deposit for prior service (see item 4) unpaid as of the judge's death.

(b) Dependent Children Annuity:

(i) Eligibility:

Any surviving children of a judicial official who dies after serving at least 18 months, who have not attained age 18 (or 22 if in school) or who are incapable of self-support, will receive a benefit payable until attainment of such age or termination of the condition rendering them incapable of self-support.

(ii) Amount:

If the widow(er) is still alive, each child receives an annual annuity equal to the lesser of:

- (a) \$1,548 or
- (b) \$4,644 divided by the number of children.

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If the widow(er) is deceased, each child receives an annual annuity equal to the least of:

- (a) The annuity which the widow(er) would have received if still alive, divided by the number of children.
- (b) \$1,060 or
- (c) \$3,580 divided by the number of children.

8. Return of Contributions:

(i) If a participant resigns from office or (ii) if at death there is no eligible surviving spouse or surviving child, the sum of the participant's contributions, together with interest at the rate of 3% per year after December 31, 1947 and 4% per year prior thereto, shall be (i) returned to the participant or (ii) payable to the participant's estate.

9. Cost of Living Adjustment:

For each full increase of 3% in the salaries of U.S. judges and justices, survivor annuities are increased by 3%.

JUDICIAL SURVIVORS' ANNUITIES SYSTEM

Actuarial Report for Year Ending
December 31, 1983

Funding Method, Factors and Assumptions
Used in Actuarial Determinations

1. Participant Data: The data used in the determinations consist of information from the prior year valuation (December 31, 1982), updated with information provided by the Administrative Office of U.S. Courts from its most recent files. All data were adjusted to reflect the participant population as of December 31, 1983. Due to the form in which individual records are maintained, it was necessary that certain elements of the data be estimated through sampling techniques which are deemed appropriate and produce results consistent with the intended purpose of this report.
2. Valuation Date: December 31, 1983.
3. Actuarial Funding Method: The actuarial determinations are made on the basis of the aggregate actuarial cost method.
4. Annual Rate of Severance Prior to Death: It is assumed that no participants withdraw from the plan prior to death.
5. Annual Rate of Mortality: Mortality is assumed to be represented by the 1971 Group Annuity Mortality Table.
6. Marital Status: It has been assumed that 95% of those participants who are under age 85 are married, and that 85% of those participants who are age 85 and older are married.
7. Remarriage Rate: It is assumed that there is no remarriage by spouses of participants who die.
8. Rate of Net Investment Return: 7% per annum.
9. Salary Scale: It is assumed that salaries will increase at the rate of 5.5% per annum.

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EDWARD H. FISKE & COMPANY
ACTUARIAL CONSULTANTS

Table 1

JUDICIAL SURVIVORS' ANNUITY SYSTEMActuarial Report for Year Ending
December 31, 1983Statement of Financial Position

	<u>December 31, 1982</u>	<u>December 31, 1983</u>
<u>Accumulated Plan Benefits</u>		
Actuarial present value of vested benefits		
(i) Participants currently receiving benefits	\$22,830,793	\$22,778,938
(ii) Other participants ^{1,2}	<u>13,027,991</u>	<u>13,612,297</u>
(iii) Total	\$36,858,784	\$36,391,235
Actuarial present value of non-vested benefits ²		
	<u>39,296,268</u>	<u>32,976,319</u>
Total actuarial present value of accumulated plan benefits	\$85,123,032	\$89,369,544

^{1,2} The vested benefit represented by this item is the anticipated return of employee contributions including credited interest, which is a minimum guarantee in the event of death (or resignation). Employee contributions with interest as of December 31, 1982 and December 31, 1983 were estimated at \$19,758,924 and \$21,946,563, respectively.

² The instructions specify that salary projections be excluded from the determination of accumulated plan benefits, but that cost of living increases be included. The System provides that survivor benefits are based on the final three year average salary of the official, and that cost of living increases for the survivor annuitants are based on corresponding salary increases of active officials. The stipulated 5% inflation assumption represents the majority of the assumed salary increases. This fact, in conjunction with the connection between the salaries of active officials and cost of living increases for annuitants, requires the incorporation of the salary projection assumptions in the determination.

Table 2 (Continued)
JUDICIAL SURVIVORS' ANNUITIES SYSTEM
Actuarial Report for Year Ending
December 31, 1983
Statement of Financial Position

	December 31, 1982	December 31, 1983
<u>Net Assets Available for Benefits</u>		
<u>Assets</u>		
Investments (market value)		
United States Government securities	\$ 5,605,962	\$ 4,891,599
Marketable securities	<u>62,867,789</u>	<u>66,199,734</u>
Total investments	\$68,473,751	\$71,091,333
Cash	\$ 177,153	\$ 225,092
Total Assets	\$68,650,884	\$71,316,425
<u>Liabilities</u>		
Accounts payable	\$ 0	\$ 0
Accrued expenses	0	0
Total Liabilities	\$ 0	\$ 0
<u>Net Assets Available for Benefits</u>	\$68,650,884	\$71,316,425

Table 2
JUDICIAL SURVIVORS' ANNUITIES SYSTEM
Actuarial Report for Year Ending
December 31, 1983
Statement of Changes in Net Assets
Available for Benefits

	Year Ended December 31, 1982	Year Ended December 31, 1983
1. Net assets available for benefits at beginning of plan year	\$46,939,692	\$68,650,884
2. Investment income		
(a) Interest	\$ 6,279,739	\$ 7,090,387
(b) Net appreciation (depreciation) in market value of investments	13,548,518	(6,200,944)
(c) Less investment expenses	(0)	(0)
(d) Total investment income	\$19,828,277	\$ 889,443
3. Contributions		
(a) Employer	\$ 2,194,102	\$ 2,265,091
(b) Employee	2,217,603	2,272,631
(c) Total	\$ 4,411,707	\$ 4,537,682
4. Other Additions	\$ 0	\$ 0
5. Total Additions	\$24,239,984	\$ 5,427,123
6. Benefit payments		
(a) Survivor annuities	\$ 2,431,781	\$ 2,624,609
(b) Death claims	49,739	2,873
(c) Refunds	27,278	134,100
(d) Total payments	\$ 2,528,798	\$ 2,761,584
7. Administrative expenses	\$ 0	\$ 0
8. Total deductions	\$ 2,528,798	\$ 2,761,584
9. Net additions	\$21,711,186	\$ 2,665,541
10. Net assets (market value) at end of plan year	\$68,650,884	\$71,316,425

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Table 3
JUDICIAL SURVIVORS' ANNUITIES SYSTEM

Actuarial Report for Year Ending
December 31, 1983

Statement of Changes in Present Value
of Accumulated Plan Benefits

1. Actuarial present value of accumulated plan benefits as of December 31, 1982	\$83,123,052
2. Increase (decrease) during the year attributable to	
(a) Benefits accumulated ¹⁾	\$ 4,046,492
(b) Plan amendment(s)	0
(c) Changes in actuarial assumptions	0
(d) Allocated insurance contracts transferred to or from insurance companies	0
(e) All other changes	0
3. Net increase (decrease)	\$ 4,046,492
4. Actuarial present value of accumulated plan benefits as of December 31, 1983	\$89,169,544

¹⁾ The increase attributable to benefits accumulated reflects the net impact of an increase in the final (three-year) average earnings level of approximately 5% and an additional year of service credit for continuing participants, partially offset by a net decrease of 6 in the number of active participants and a net decrease of 5 in the number of survivor annuitants.

Table 4
JUDICIAL SURVIVORS' ANNUITIES SYSTEM
Actuarial Status Information for Year Ending
December 31, 1983
Results of Actuarial Valuation

	December 31, 1982	December 31, 1983
1. Present value of future benefits ^{1,2}		
(a) Current annuitants	\$ 32,830,793	\$ 22,778,938
(b) Active participants	101,762,994	100,490,886
(c) Total	\$124,593,787	\$123,269,824
2. Present value of future employer/ employee normal costs	\$ 61,267,833 ^{2,4}	\$ 56,520,122 ^{2,4}
3. Accrued liability	N.A. ^{2,4}	N.A. ^{2,4}
4. Assets in fund	\$ 68,650,884	\$ 71,316,625
5. Assets adjusted to exclude employer/ employee contributions plus interest for Plan Year	\$ 63,325,934	\$ 64,749,702
6. Unfunded accrued liability	N.A. ^{2,4}	N.A. ^{2,4}
7. Normal cost as a percentage of covered payroll		
(a) Employee	4.50%	4.50%
(b) Employer	3.83%	3.46%
8. Present value of benefits in payment status plus accumulated employee contributions		
(a) Actuarial value [Line 1(a) plus accumulated employee contributions]	\$ 42,589,717	\$ 44,723,501
(b) Plan assets divided by (a)	1.612	1.595
(c) First prior year ratio corres- ponding to (b)	1.189	1.612
(d) Second prior year ratio corres- ponding to (b)	1.203	1.189

(Footnotes on following page)

Results of Actuarial Valuation (continued)

1. The decrease in the present value of future benefits is attributable primarily to a net decrease of 6 active participants and 3 survivor annuitants, no salary increases during 1983 for judicial officials, and no corresponding cost-of-living increases for survivor annuitants.
2. As of December 31, 1982, the funding method was changed from the Entry Age Normal funding method to the Aggregate method. Under this method, there is no accrued liability. The present value of future employer/employee normal costs is equal to the Present Value of Future Benefits minus Plan Assets.

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Table 5
JUDICIAL SURVIVORS' ANNUITIES SYSTEM
Actuarial Report for Year Ending December 31, 1983
Comparison of Actuarial Funding Determinations
with Actual Contributions
(in dollars)

(1)	(2)	(3)	(4)	(5)	(6)	(7)
Plan Year	Normal Cost	Amortization of Unfunded Liability 1/	Total Actuarial Contribution [Col. (2) plus Col. (3)]	Actual Contributions to Plan from All Sources	Difference Between Col. (4) and Col. (5)	Col. (5) Divided by Col. (4)
1979	\$3,132,338	\$ 0	\$3,132,338	\$3,301,280	\$(258,942)	.981
1980	3,799,685	569,198	4,368,884	3,998,995 2/	369,889	.915
1981	3,980,384	1,176,327	5,156,711	4,855,081 3/	301,630	.942
1982	4,020,695	0	4,020,695	4,411,707	(391,012)	1.097
1983	3,944,691	0	3,944,691	4,537,682	(592,991)	1.150

- 1/ Instructions specify that contributions should include a provision to fully provide for amortizing an existing unfunded accrued liability over 40 years.
- 2/ Includes contributions accrued with respect to the periods 10/1/76 through 2/28/77, 10/1/79 through 9/30/80, and 10/1/80 through 12/31/80. These are reflective of employer/employee contributions due for the retroactive compensation awarded all U.S. judicial officials. The additional employer \$121,596 and employee \$121,596 contributions were actually made during 1981.
- 3/ This amount includes a direct appropriation of \$616,000 made pursuant to Public Law 96-504. It however excludes retroactive contributions made during 1981 with respect to the periods 10/1/76 through 2/28/77, 10/1/79 through 9/30/80, and 10/1/80 through 12/31/80. These were accrued as of the last valuation date (12/31/80) and included in the contributions for the 1983 plan year.

Table 5(a)
JUDICIAL SURVIVORS' ANNUITIES SYSTEM
Actuarial Report for Year Ending December 31, 1983
Comparison of Actuarial Funding Determinations
with Actual Contributions
(as a percentage of payroll)

(1)	(2)	(3)	(4)	(5)	(6)	(7)
Plan Year	Normal Cost	Amortization of Unfunded Liability 1/	Total Actuarial Contribution [Col. (2) plus Col. (3)]	Actual Contributions To Plan from All Sources	Difference Between Col. (4) and Col. (5)	Col. (5) Divided by Col. (4)
1979	8.36%	0.00%	8.36%	9.05%	(.69)%	1.083
1980	8.65	1.29	9.94	9.10 2/	.84	.915
1981	8.44	2.49	10.93	10.30 3/	.63	.942
1982	8.33	0.00	8.33	9.14	(.81)	1.097
1983	7.96	0.00	7.96	9.16	(1.20)	1.150

- 1/ Instructions specify that contributions should include a provision to fully provide for an existing unfunded accrued liability over 40 years.
- 2/ Includes contributions accrued with respect to the periods 10/1/76 through 2/28/77, 10/1/79 through 9/30/83, and 10/1/80 through 12/31/80. These are reflective of employer/employee contributions due for the retroactive compensation awarded all U. S. judicial officials. The additional employer \$123,596 and employee \$123,596 contributions were actually made during 1981.
- 3/ This amount includes a direct appropriation of \$616,000 made pursuant to Public law 96-504. It however excludes retroactive contributions made during 1981 with respect to the periods 10/1/76 through 2/28/77, 10/1/79 through 9/30/80, and 10/1/80 through 12/31/80. These were accrued as of the last valuation date (12/31/80) and included in the contributions for the 1980 plan year.

JUDICIAL SURVIVORS' ANNUITIES SYSTEM

ACTUARIAL REPORT FOR YEAR ENDING

DECEMBER 31, 1984

Prepared by:

EDWARD H. FRIEND & COMPANY
A Division of Johnson & Higgins
of Washington, D.C., Inc.

Ruth A. Flanders

Ruth A. Flanders
Actuarial Analyst

Peter D. Verne

Peter D. Verne
Enrolled Actuary

June 27, 1985
Washington, D.C.

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JUDICIAL SURVIVORS' ANNUITIES SYSTEM

Actuarial Report for Year Ending
December 31, 1984

A. Purpose

The purpose of this report is to comply with the requirements of Public Law 95-595 in accordance with the instructions provided by the United States General Accounting Office.

The report consists of a brief overview and summary, followed by the general information statement, a summary of principal plan provisions, a summary of funding methods, factors and assumptions used in the actuarial determinations, and the six tables required by the instructions provided.

B. General Considerations

The Judicial Survivors' Annuities System provides death benefit coverage throughout the lifetime of judicial officials of the U.S. who elect, within six months of taking office, to be covered by the plan and to contribute 4 1/2% of compensation earned each pay period (U.S. Code paragraph 376).

In determining the amount of the death benefit, credit is given to service rendered not only as a judge or justice, but also in a congressional, military or executive branch employee capacity. The participant is required to make contributions only for 18 months of any service rendered prior to his coverage under the plan. Upon death, however, 10% of that portion of the amount the participant should have contributed for all prior service which was not contributed is deducted from the survivor benefit.

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The Judicial Survivors' Annuities System also includes provision for optional coverage to the Director of the Administrative Office of the U.S. Courts, the Director of the Federal Judicial Center, and the Administrative Assistant to the Chief Justice of the Supreme Court. These officials may instead, however, elect coverage under the Civil Service Retirement System, in which case the provisions of this plan do not apply. Presently, only the Administrative Assistant to the Chief Justice is covered under the Judicial Survivors' Annuities System. It is assumed for valuation purposes that in the future the same will hold true.

The instructions for preparing this report specified that the assumed future rate of inflation should be 5%. A 7% annual rate of return on invested assets and a 5 1/2% annual rate of salary increase for active judges is assumed in conjunction with the specified rate of inflation and is considered appropriate for use in determining the pre-funding contribution requirements. The investment return assumption implies a real rate of return equal to 2% and the salary increase assumption includes a 5% cost-of-living increase component, plus a 1/2% general productivity increase component. No merit increase component was included since judicial officials are assumed to already be at the height of their career and all receive equal salaries.

No member of the participant group is assumed to resign from office, either before or after retirement.

C. Summary of Conclusions

For 1984, total contributions equal to 9.15% of payroll were made to the Judicial Survivors' Annuities System. These represent scheduled employer/employee contributions (at the combined rate of 9.00%) and contributions for buyback of prior service, the total expressed as a percentage of year-end participant payroll.

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Based on the results of this valuation, there was no unfunded actuarial accrued liability as of December 31, 1984, and the 9.15% of payroll contribution made for 1984 exceeded the 6.57% of payroll contribution necessary to fund the 1984 normal cost.

The comparison of calculated contributions and actual contributions over the past few years (excluding any direct appropriation amounts) indicates a continuation of the favorable plan experience which began during 1982.

The principal economic and demographic factors which impact on plan costs are the annual rate of salary increase, the annual rate of investment return and the annual rate of mortality. There were salary increases in 1984 for judicial officials of approximately 4%. The assumed annual rate of salary increase for valuation purposes is 3 1/2%. As such, the plan experienced gains resulting from the difference between actual and anticipated salary increases. In addition, fewer active participants died than anticipated, while the release in accrued liability attributable to survivor annuitants who died (or otherwise ceased to be eligible) exceeded the expected amount of release, providing a second source of experience gain.

There were further experience gains attributable to a 1984 rate of investment return (on a market value basis) of approximately 15.6%, which is well above the assumed 7% rate of return. The investment results reflect an appreciation in the market value of the fund's fixed income investments over the period from December 31, 1983 to December 31, 1984, corresponding to decrease in long-term interest rates during that same period.

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JUDICIAL SURVIVORS' ANNUITIES SYSTEMActuarial Report for Year Ending
December 31, 1984Statement of General Information

1. Name of plan	Judicial Survivors' Annuities System
2. Name and address of plan sponsor	Administrative Office of the United States Courts The Federal Judiciary Export-Import Bank Building 811 Vermont Avenue, N.W. Washington, D. C. 20005
3. Name and phone number of plan administrator	Mr. Edward V. Garabedian Administrative Office of the United States Courts (202) 633-6101
4. Type of plan entity	Single-employer plan
5. Date plan established	August 3, 1956
6. Plan participants at end of plan year	
(a) Active Participants *	662
(b) Survivor Annuitants	
(i) Spouses	193
(ii) Dependent Children	<u>10</u>
(iii) Total	<u>203</u>
(c) Total	865
7. Type of Plan	Defined benefit

* Includes judges and justices in active status, as well as those retired under U.S. Code paragraphs 371(a) (age retirement and resignation), 371(b) (age retirement to senior status), 372(a) (disability retirement), and 373 (age retirement for territorial judges). All of the above continue to contribute to the survivors' plan.

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8. In this plan year, the plan was not merged or consolidated into another plan, nor were assets or liabilities transferred to another plan.
9. Administrative costs are not borne by this plan. Rather they are borne by the Administrative Office of the United States Court.
10. Funding arrangement Designated fund
11. Date of most recent actuarial valuation December 31, 1984
12. Actuarial cost method used in completing Tables 4 and 5 Aggregate Actuarial Cost Method
13. Actuarial assumptions
- (a) Economic
- (i) Rate of return on plan investments 7% per annum
- (ii) Ratio of salary expected at age 70 to salary at
- | | Men | Women |
|--------|-------|-------|
| Age 25 | 1113% | 1113% |
| Age 40 | 498 | 498 |
| Age 55 | 223 | 223 |
- (b) Decrements
- (i) Basis of mortality assumptions 1971 Group Annuity Mortality Tables for Males and Females
- (ii) Normal Retirement Age N.A.
- Lowest age at which employees may voluntarily retire with full benefits N.A.
- (iii) Basis of withdrawal assumptions None
14. A summary of plan provisions is attached.

The values which have been determined for this report are based on actuarial assumptions which, in the opinion of the actuary, are appropriate for the purposes of the Statement, are reasonable in the aggregate (taking into account the experience of the plan and reasonable expectations), and, when applied in combination, represent his best estimate of the measure of anticipated experience under the plan.

I declare that I have examined this report, including accompanying tables and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Peter D. Verne 4/1/75
 Peter D. Verne Date
 Vice President
 Edward H. Friend & Company
 A Division of Johnson & Higgins
 of Washington, D.C., Inc.
 1800 K Street, N.W., Suite 500
 Washington, D. C. 20006
 (202) 785-9080

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 Enrollment Number

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JUDICIAL SURVIVOR'S ANNUITIES SYSTEMActuarial Report for Year Ending
December 31, 1984Principal Plan Provisions

1. Effective Date: August 3, 1956.
2. Plan Year: The plan year is the calendar year.
3. Participation: Any judge or justice of the United States, including its territories and possessions, the Director of the Administrative Office of the U.S. Courts, the Director of the Federal Judicial Center, and the Administrative Assistant to the Chief Justice of the Supreme Court is eligible to participate. Election to do so must be made within six months of appointment to office, and such election is irrevocable.
4. Contributions:
 - (a) Employee: A participant contributes 4 1/2% of salary, if in active status, or of retirement income, if on age or disability retirement. For judicial service rendered prior to inception of the plan, and for certain periods of prior non-judicial government service, a participant may also deposit 4 1/2% of salary earned during those periods, together with interest at the rate of 3% per year after December 31, 1947 and 4% per year prior thereto. No deposits are required for military service.
 - (b) Employer: The U.S. Government makes matching contributions of 4 1/2% of total participant compensation each pay period.

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5. Creditable Service:

Service creditable for purposes of determining the survivor benefit includes all judicial and congressional service, certain military service, and certain other service with the executive branch of the Federal government.

6. Average Compensation:

Average compensation is the highest three year average of judicial compensation prior to death.

7. Survivor Benefits:(a) Spouse Annuity:(i) Eligibility:

The surviving spouse of a judicial official who dies after serving at least 18 months and who was married at least one year prior to death will receive a benefit payable for life or until remarriage.

(ii) Amount:

The annual amount of the annuity is equal to $1\frac{1}{4}\%$ of average compensation for each year of creditable service, excluding service in the executive branch which exceeds 15 years or military service which exceeds 5 years, plus $\frac{3}{4}\%$ of average compensation for service in the executive branch which exceeds 15 years.

The annuity may not exceed 40% of average compensation and is reduced by 10% of any portion of the deposit for prior service (see item 4) unpaid as of the judge's death.

(b) Dependent Children Annuity:(i) Eligibility:

Any surviving children of a judicial official who dies after serving at least 18 months, who have not attained age 18 (or 22 if in school) or who are incapable of self-support, will receive a benefit payable until attainment of such age or termination of the condition rendering them incapable of self-support.

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(ii) Amount:

If the widow(er) is still alive, each child receives an annual annuity equal to the lesser of:

- (a) \$1,548 or
- (b) \$4,644 divided by the number of children.

If the widow(er) is deceased, each child receives an annual annuity equal to the least of:

- (a) The annuity which the widow(er) would have received if still alive, divided by the number of children,
- (b) \$1,860 or
- (c) \$5,580 divided by the number of children.

8. Return of Contributions:

(i) If a participant resigns from office or (ii) if at death there is no eligible surviving spouse or surviving child, the sum of the participant's contributions, together with interest at the rate of 3% per year after December 31, 1947 and 4% per year prior thereto, shall be (i) returned to the participant or (ii) payable to the participant's estate.

9. Cost of Living Adjustment:

For each full increase of 5% in the salaries of U.S. judges and justices, survivor annuities are increased by 3%.

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JUDICIAL SURVIVORS' ANNUITIES SYSTEM

Actuarial Report for Year Ending
December 31, 1984

Funding Method, Factors and Assumptions
Used in Actuarial Determinations

1. Participant Data: The data used in the determinations consist of information from the prior year valuation (December 31, 1983), updated with information provided by the Administrative Office of U.S. Courts from its most recent files. All data were adjusted to reflect the participant population as of December 31, 1984. Due to the form in which individual records are maintained, it was necessary that certain elements of the data be estimated through sampling techniques which are deemed appropriate and produce results consistent with the intended purpose of this report.
2. Valuation Date: December 31, 1984.
3. Actuarial Funding Method: The actuarial determinations are made on the basis of the aggregate actuarial cost method.
4. Annual Rate of Severance Prior to Death: It is assumed that no participants withdraw from the plan prior to death.
5. Annual Rate of Mortality: Mortality is assumed to be represented by the 1971 Group Annuity Mortality Table.
6. Marital Status: It has been assumed that 95% of those participants who are under age 85 are married, and that 85% of those participants who are age 85 and older are married.
7. Remarriage Rate: It is assumed that there is no remarriage by spouses of participants who die.
8. Rate of Net Investment Return: 7% per annum.
9. Salary Scale: It is assumed that salaries will increase at the rate of 5.5% per annum.

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Table 1

JUDICIAL SURVIVORS' ANNUITIES SYSTEMActuarial Report for Year Ending
December 31, 1984Statement of Financial Position

	<u>December 31,</u> <u>1984</u>	<u>December 31,</u> <u>1983</u>
<u>Accumulated Plan Benefits</u>		
Actuarial present value of vested benefits		
(i) Participants currently receiving benefits	\$23,309,484	\$22,778,938
(ii) Other participants ^{1j}	<u>15,042,985</u>	<u>13,412,287</u>
(iii) Total	\$38,352,469	\$36,191,225
Actuarial present value of non-vested benefits ^{1j}		
	<u>* 57,738,418</u>	<u>52,978,319</u>
Total actuarial present value of accumulated plan benefits	\$96,090,887	\$89,169,544

^{1j} The vested benefit represented by this item is the anticipated return of employee contributions including credited interest, which is a minimum guarantee in the event of death (or resignation). Employee contributions with interest as of December 31, 1983 and December 31, 1984 were estimated at \$21,944,563 and \$24,441,118, respectively.

^{2j} The instructions specify that salary projections be excluded from the determination of accumulated plan benefits, but that cost of living increases be included. The System provides that survivor benefits are based on the final three year average salary of the official, and that cost of living increases for the survivor annuitants are based on corresponding salary increases of active officials. The stipulated 3% inflation assumption represents the majority of the assumed salary increase. This fact, in conjunction with the connection between the salaries of active officials and cost of living increases for annuitants, requires the incorporation of the salary projection assumptions in the determination.

Table 1 (Continued)

JUDICIAL SURVIVORS' ANNUITIES SYSTEMActuarial Report for Year Ending
December 31, 1984Statement of Financial Position

	<u>December 31,</u> <u>1984</u>	<u>December 31,</u> <u>1983</u>
<u>Net Assets Available for Benefits</u>		
<u>Assets</u>		
Investments (market value)		
United States Government securities	\$ 4,661,779	\$ 4,891,599
Marketable securities	<u>79,582,725</u>	<u>66,199,734</u>
Total investments	\$84,244,504	\$71,091,333
Cash	\$ 208,818	\$ 225,092
Total Assets	\$84,453,322	\$71,316,425
<u>Liabilities</u>		
Accounts payable	\$ 0	\$ 0
Accrued expenses	0	0
Total Liabilities	\$ 0	\$ 0
<u>Net Assets Available for Benefits</u>	\$84,453,322	\$71,316,425

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Table 2

JUDICIAL SURVIVORS' ANNUITIES SYSTEMActuarial Report for Year Ending
December 31, 1984Statement of Changes in Net Assets
Available for Benefits

	<u>Year Ended December 31, 1984</u>	<u>Year Ended December 31, 1983</u>
1. Net assets available for benefits at beginning of plan year	\$71,316,425	\$68,650,684
2. Investment income		
(a) Interest	\$ 8,302,332	\$ 7,090,387
(b) Net appreciation (depreciation) in market value of investments	3,073,637	(6,200,944)
(c) Less investment expenses	(17,899)	(0)
(d) Total investment income	\$11,376,209	\$ 889,443
3. Contributions		
(a) Employer	\$ 2,313,474	\$ 2,263,051
(b) Employee	2,329,825	2,272,631
(c) Less: Refunds, current	17,899	---
(d) Total	\$ 4,625,400	\$ 4,535,682
4. Other Additions	\$ 0	\$ 0
5. Total Additions	\$16,001,609	\$ 5,427,123
6. Benefit payments		
(a) Survivor annuities	\$ 2,581,237	\$ 2,624,609
(b) Death claims	28,088	2,873
(c) Total payments	\$ 2,609,325	\$ 2,627,484
7. Administrative expenses	\$ 0	\$ 0
8. Refund of prior year contributions	\$ 255,387	\$ 134,100 ^{1J}
9. Total deductions	\$ 2,864,712	\$ 2,761,584
10. Net additions	\$13,136,897	\$ 2,665,341
11. Net assets (market value) at end of plan year	\$84,453,322	\$71,316,425

^{1J} Prior to the 1984 plan year refunds of contributions were not separately identified as to what portion represented refund of current year contributions and what portion represented refund of prior year contributions.

Table 3
JUDICIAL SURVIVORS' ANNUITIES SYSTEM

Actuarial Report for Year Ending
December 31, 1984

Statement of Changes in Present Value
of Accumulated Plan Benefits

1. Actuarial present value of accumulated plan benefits as of December 31, 1983	\$89,169,544
2. Increase (decrease) during the year attributable to	
(a) Benefits accumulated ^{1/}	\$ 6,921,343
(b) Plan amendment(s)	0
(c) Changes in actuarial assumptions	0
(d) Allocated insurance contracts transferred to or from insurance companies	0
(e) All other changes	0
3. Net increase (decrease)	\$ 6,921,343
4. Actuarial present value of accumulated plan benefits as of December 31, 1984	\$96,090,887

^{1/} The increase attributable to benefits accumulated reflects the net impact of an increase in the final (three-year) average earnings level of approximately 4% and an additional year of service credit for continuing participants, partially offset by a net decrease of 6 in the number of active participants and a net decrease of 4 in the number of survivor annuitants.

Table 4

JUDICIAL SURVIVORS' ANNUITIES SYSTEMActuarial Status Information for Year Ending
December 31, 1984Results of Actuarial Valuation

	December 31, 1984	December 31, 1983
1. Present value of future benefits ^{1J}		
(a) Current annuitants	\$ 23,309,484	\$ 22,778,938
(b) Active participants	102,367,770	100,490,886
(c) Total	\$125,677,254	\$123,269,824
2. Present value of future employer/ employee normal costs ^{2J}	\$ 58,895,372	\$ 56,520,122
3. Accrued liability ^{3J}	N.A.	N.A.
4. Assets in fund	\$ 84,453,322	\$ 71,316,425
5. Assets adjusted to exclude employer/ employee contributions plus interest for Plan Year	\$ 79,444,131	\$ 66,749,702
6. Unfunded accrued liability ^{4J}	N.A.	N.A.
7. Normal cost as a percentage of covered payroll		
(a) Employee	4.50%	4.50%
(b) Employer	2.07%	3.46%
8. Present value of benefits in payment status plus accumulated employee contributions		
(a) Actuarial value [Line 1(a) plus accumulated employee contributions]	\$ 47,750,602	\$ 44,723,501
(b) Plan assets divided by (a)	1.769	1.595
(c) First prior year ratio corres- ponding to (b)	1.595	1.612
(d) Second prior year ratio corres- ponding to (b)	1.612	1.189

(Footnotes on following page)

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Results of Actuarial Valuation (continued)

- 1) The increase in the present value of future benefits is attributable primarily to a salary increase of approximately 4%.
- 2) As of December 31, 1982, the funding method was changed from the Entry Age Normal funding method to the Aggregate method. Under this method, there is no accrued liability. The present value of future employer/employee normal costs is equal to the Present Value of Future Benefits minus Plan Assets.

Table 5
JUDICIAL SURVIVORS' ANNUITIES SYSTEM
Actuarial Report For Year Ending December 31, 1984
Comparison of Actuarial Funding Determinations
With Actual Contributions
(in dollars)

(1)	(2)	(3)	(4)	(5)	(6)	(7)
Plan Year	Normal Cost	Amortization of Unfunded Liability 1/	Total Actuarial Contribution [Col. (2) plus Col. (3)]	Actual Contributions To Plan From All Sources	Difference Between Col. (4) and Col. (5)	Col. (5) Divided by Col. (4)
1979	\$3,132,338	\$ 0	\$3,132,338	\$3,391,280	\$(258,942)	1.083
1980	3,799,686	569,198	4,368,884	3,998,995 2/	369,889	.915
1981	3,980,184	1,176,327	5,156,711	4,855,081 3/	301,630	.942
1982	4,020,695	0	4,020,695	4,411,707	(391,012)	1.097
1983	3,944,691	0	3,944,691	4,537,682	(592,991)	1.150
1984	3,331,640	0	3,331,640	4,643,299	(1,311,659)	1.394

- 1/ Instructions specify that contributions should include a provision to fully provide for amortizing an existing unfunded accrued liability over 40 years.
- 2/ Includes contributions accrued with respect to the periods 10/1/76 through 2/28/77, 10/1/79 through 9/30/80, and 10/1/80 through 12/31/80. These are reflective of employer/employee contributions due for the retroactive compensation awarded all U.S. Judicial officials. The additional employer \$323,596 and employee \$323,596 contributions were actually made during 1981.
- 3/ This amount includes a direct appropriation of \$616,000 made pursuant to Public Law 96-504. It however excludes retroactive contributions made during 1981 with respect to the periods 10/1/76 through 2/28/77, 10/1/79 through 9/30/80, and 10/1/80 through 12/31/80. These were accrued as of the last valuation date (12/31/80) and included in the contributions for the 1980 plan year.

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Table 3(a)

JUDICIAL SURVIVORS' ANNUITIES SYSTEM

Actuarial Report For Year Ending December 31, 1980

Comparison of Actuarial Funding Determinations
with Actual Contributions
(as a percentage of payroll)

(1)	(2)	(3)	(4)	(5)	(6)	(7)
Plan Year	Normal Cost	Amortization of Unfunded Liability 1/	Total Actuarial Contribution [Col. (2) plus Col. (3)]	Actual Contributions To Plan from All Sources	Difference Between Col. (4) and Col. (5)	Col. (5) Divided by Col. (4)
1979	8.36%	0.00%	8.36%	9.05%	(.69)%	1.083
1980	8.65	1.29	9.94	9.10 2/	.84	.915
1981	8.44	2.49	10.93	10.30 3/	.63	.942
1982	8.33	0.00	8.33	9.14	(.81)	1.097
1983	7.96	0.00	7.96	9.16	(1.20)	1.150
1984	6.57	0.00	6.57	9.15	(2.58)	1.393

- 1/ Instructions specify that contributions should include a provision to fully provide for an existing unfunded accrued liability over 40 years.
- 2/ Includes contributions accrued with respect to the periods 10/1/76 through 2/28/77, 10/1/79 through 9/30/80, and 10/1/80 through 12/31/80. These are reflective of employer/employee contributions due for the retroactive compensation awarded all U. S. Judicial officials. The additional employer \$323,596 and employee \$323,596 contributions were actually made during 1981.
- 3/ This amount includes a direct appropriation of \$616,000 made pursuant to Public Law 96-504. It however excludes retroactive contributions made during 1981 with respect to the periods 10/1/76 through 2/28/77, 10/1/79 through 9/30/80, and 10/1/80 through 12/31/80. These were accrued as of the last valuation date (12/31/80) and included in the contributions for the 1980 plan year.

APPENDIX IV

ADDITIONAL MATERIALS RELATING TO REMOVAL JURISDICTION

Duke University

SCHOOL OF LAW

Monday 13 May 1985

POSTAL CODE 27705

Hon. Robert W. Kastenmeier, Chairman
Subcommittee on Courts, Civil Liberties and the Administration of
Justice
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your letter of May 3, 1985, requesting comments on Congressman Synar's bill to permit federal courts to hear and determine claims removed from a state court that lacked jurisdiction over them. This change appears to be a good idea, although as Mr. Synar's discussion candidly admits the problem it addresses is not a large one. The procedural moves required by the present "derivative" jurisdiction rule are fairly simple--dismissal of the removed case and its re-filing in the federal court as an original matter. True, they are also pointless and somewhat wasteful.

Two additions might improve the present draft. First, reference solely to a "claim" over which the state court lacked jurisdiction might leave some small doubt about intent to include both cases entirely outside state court jurisdiction and cases having some claims within and some without the state court's power. It might therefore be wise to have the draft mention actions or claims the federal court may hear and determine.

Second, the draft as it stands might be subject to an interpretation that it confers territorial jurisdiction on a federal court that does not otherwise have it. Federal courts are often confined to the long-arm authority of the courts of the state in which they sit, even if their exercise of territorial jurisdiction would be constitutional. Presumably, the bill is not meant to cure that kind of jurisdictional defect. A proviso referring to cases otherwise within the federal court's territorial and original subject matter jurisdiction should prevent any difficulty here.

If your members and staff think such changes would be useful, one way of incorporating these suggestions would be as follows:

(e) The court to which such civil action is removed is not precluded from hearing and determining the action or any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that action or claim, provided that the district court

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would have had both territorial and original subject matter jurisdiction over the action or claim had it been filed there.

Please feel free to call on me if I can help further. And again, let me commend you and your staff for your continuing attention to technical matters that significantly affect the working of our judicial system yet doubtless get you little credit with the electorate in general.

Sincerely yours,


Thomas D. Rowe, Jr.
Professor of Law

cc: Hon. Mike Synar

SYRACUSE UNIVERSITY
COLLEGE OF LAW

ERNEST I. WHITE HALL / SYRACUSE NEW YORK 13210

(315) 423-1964

May 21, 1985

Hon. Robert W. Kastenmeier
United States House of Representatives
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
Washington, D.C. 20515

RE: Bill to Amend 28 U.S.C. §1441

Dear Congressman Kastenmeier:

Congressman Synar's bill addresses a problem that is rather narrow in scope but nevertheless deserving of attention. As the Synar memorandum states, the removal jurisdiction of the federal court is derivative. If the state court lacks jurisdiction, the federal court acquires none on removal. E.g. Lambert Run Coal Co. v. Baltimore v. Ohio Railroad, 258 U.S. 377, 382 (1922).

Use of a derivative jurisdiction doctrine in this context has been uniformly criticized, see, e.g., 1A Moore's Federal Practice §0.157[3.-2], and I might add, rightly so. As Professor Wright explains it leads to an "absurd" result: a federal court must dismiss a case within its exclusive jurisdiction because the state court from which the case was removed had no jurisdiction. C. Wright, Law of Federal Courts §38 at 212 (4th ed. 1983). As a practical matter, the plaintiff then must waste resources on refiling a federal action. Moreover, the litigant faces the possibility that the statute of limitations has expired in the interim.

Additional practical problems are presented when, as often occurs, a plaintiff commences a state court action asserting state claims, federal claims that may be heard by the state court, and federal claims within the exclusive jurisdiction of the federal court. If the case is removed, the federal court must dismiss those federal claims within its exclusive jurisdiction and then determine the proper disposition of the remaining federal and state law claims. The courts are divided over whether these claims should be dismissed, should be remanded to state court, or should be heard by the federal court. See Salveson v. Western States Bankcard Ass'n, 525 F. Supp. 566 (N.D. Calif. 1981); 1A Moore's Federal Practice, supra.

It is difficult to ascertain any real basis for continuation of the derivative jurisdiction doctrine. Perhaps, as Judge Schwarzer said in Salveson, supra at 578n.12, it is premised on the notion that where Congress has provided for exclusive jurisdiction in the federal courts, it is not unreasonable to require the plaintiff to comply with the

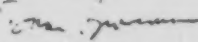
procedural requirements governing commencement of the action in federal court. The exact nature of such procedural requirements, however, is not clear. Certainly under Fed. R. Civ. P. 4, service of process in federal court is often identical to that in state court. Moreover, it should be noted that in some instances plaintiff may characterize the claims as based on state law but later find that the claims are being treated as federal and within the exclusive jurisdiction of the federal court. See Federated Department Stores, Inc. v. Moitie, 452 U.S. 394n.2(1981).

Congress, I believe, has the power to remedy the problems caused by the derivative jurisdiction doctrine. Although, the Constitution does not mention removal jurisdiction, it is well settled that such jurisdiction falls within the limits of Article III and that Congress has power to confer it on the federal courts. See Tennessee v. Davis, 100 U.S. 257 (1880). Indeed Congress has authorized such jurisdiction in varying forms since the Judiciary Act of 1789. Because, the derivative jurisdiction doctrine is not constitutionally compelled, Congress is free to eliminate it.

My only recommendation is that the proposed bill should make clear that it applies to suits removed under other removal provisions. Professor Moore points out that the derivative requirement applies to suits removed under these other provisions, such as 28 U.S.C. §1442. See 1A Moore's Federal Practice, supra, at 0.157(J.-1).

If I can be of any further assistance, please contact me.

Very truly yours


Dean Braveman

DB/las

SOME PROBLEMS IN FEDERAL QUESTION JURISDICTION

*George B. Fraser, Jr.**

CONGRESS has given the federal district courts original and removal jurisdiction of all civil actions arising under the Constitution or laws of the United States,¹ but the power of these courts to hear such cases has been restricted by the Supreme Court of the United States. The Supreme Court holds that the district courts have jurisdiction of a case if a federal question is raised in the complaint,² but jurisdiction cannot be based on a federal question in the answer.³ This means that the district courts are closed to many cases that involve a substantial federal issue, while many cases that contain no real federal issue may be tried in a district court. This anomalous situation has been criticized in several articles,⁴ but it was recently defended in an article in this *Review* entitled "Reappraisal of Federal Question Jurisdiction."⁵ Insofar as it upholds the rule that federal jurisdiction should exist if the complaint raises a federal question this article is correct, but it is wrong in approving the rule that the district courts should not have jurisdiction of cases that contain a federal question in the answer. Therefore, this paper will make a further appraisal of the power of district courts to hear such cases.

In addition to the above limitation on the jurisdiction of the district courts the Supreme Court holds that if a case is within the exclusive jurisdiction of the federal courts it cannot be removed from a state court to a federal court.⁶ The case must be dismissed so that it can be brought originally in a federal court. This holding will also be discussed in this paper because it is believed to be erroneous.

* Professor of Law, University of Oklahoma.—Ed.

¹ 62 Stat. L. 869 (1948), 28 U.S.C.A. (1948) §§1331 and 1441(a). Also the matter in controversy must exceed the value of \$3,000.

² *Gully v. First National Bank in Meridian*, 299 U.S. 109, 57 S.Ct. 96 (1936).

³ *Tennessee v. Union and Planters' Bank*, 152 U.S. 454, 14 S.Ct. 654 (1894); *Metcalf v. Watertown*, 128 U.S. 586, 9 S.Ct. 173 (1888).

⁴ Chadbourne and Levin, "Original Jurisdiction of Federal Questions," 90 *Univ. Pa. L. Rev.* 639 (1942); comment, 40 *ILL. L. Rev.* 387 (1945).

⁵ Bergman, "Reappraisal of Federal Question Jurisdiction," 46 *MICH. L. REV.* 17 (1947).

⁶ *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.*, 258 U.S. 377, 42 S.Ct. 349 (1922).

I

The Federal Issue Test

The Constitution of the United States provides that "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."⁷ In construing this clause the Supreme Court has held that a case arises under the Constitution or a law of the United States if a construction or interpretation of the Constitution or a federal law is required in order to determine the case.⁸ In *Cohens v. Virginia*, which was removed to the Supreme Court of the United States from the highest court of Virginia by writ of error, Chief Justice Marshall stated: "A case . . . may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends upon the construction of either."⁹ Thus, if federal issues are involved in a case, the case is within the judicial power of the United States. To determine if federal issues are involved the pleadings of both parties must be considered; the pleading of one party will show only what issues could be raised.

In 1875 Congress passed the first general act giving the inferior federal courts the power to hear federal question cases. It provided that the circuit courts should have "original cognizance . . . of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made under their authority."¹⁰ The circuit courts were also given removal jurisdiction of such cases.

The words used in this act are almost the same as those used in the Constitution; therefore they should be interpreted as giving the circuit courts the power to hear all cases that involved federal issues no matter which party raises these issues. Also, Congress intended to give the circuit courts the full Constitutional power to hear federal question cases. At the time this act was being discussed in the Senate, Senator Carpenter, who was spokesman for the Judiciary Committee on the floor, stated, "This bill gives precisely the power which the

⁷ U.S. CONST., Art. III, § 2.

⁸ *Cohens v. Virginia*, 6 Wheat. (19 U.S.) 264 (1821).

⁹ *Id.* at 379. The Supreme Court stated in a later case: "When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution, upon the determination of which the result depends, then it is not a suit arising under the Constitution." *New Orleans v. Benjamin*, 153 U.S. 411 at 424, 14 S.Ct. 905 (1894).

¹⁰ 18 Stat. 470, § 1 (1875). The act also contained a jurisdictional minimum of \$500.

Constitution confers—nothing more, nothing less."¹¹ This same view was expressed by the Supreme Court in *In re Hohorst* when it stated:

"The intention of Congress is manifest, at least as to cases of which the courts of the several states have concurrent jurisdiction, and which involve a certain amount or value, to vest in the Circuit Courts of the United States full and effectual jurisdiction, as contemplated by the Constitution, over each of the classes of controversies above mentioned. . . ."¹²

Later, in *Railroad Company v. Mississippi*,¹³ the Supreme Court specifically held that the circuit courts had the power to hear a case that involved federal issues even though those issues were raised by the defendant. The dissent held that the circuit courts could not take jurisdiction of such a case because the statute used the word "suit" and a suit does not include the defense.¹⁴ However, this was a removal case so that the federal issues had been raised by the time the case reached the federal court. In a later case the Supreme Court pointed out this fact. It stated:

"It has been often decided by this court that a suit may be said to arise under the Constitution or laws of the United States, within the meaning of that act, even where the Federal question upon which it depends is raised, for the first time in the suit, by the answer or plea of the defendant. But these were removal cases, in each of which the grounds of Federal jurisdiction were disclosed either in the pleadings, or in the petition or affidavit for removal; in other words, the case, at the time the jurisdiction of the Circuit Court of the United States attached, by removal clearly presented a question or questions of a Federal nature."¹⁵

A different rule was applied to original jurisdiction cases. Not only must the case arise under the Constitution or the laws of the United States, but also the fact that it contains a federal question must appear at the time the action is brought. Therefore, the federal question must appear in the petition; jurisdiction cannot be based on a federal issue raised by the answer. In *Metcalf v. Watertown* the Supreme Court stated:

¹¹ 2 CONG. REC. 4987 (1874). See Forrester, "Nature of a Federal Question," 16 *TULANE L. REV.* 362 at 375 (1942).

¹² 150 U.S. 653 at 659, 14 S.Ct. 221 (1893).

¹³ 102 U.S. 135 (1880).

¹⁴ *Id.* at 142. The dissent held that the statute should be interpreted differently from the Constitution because the statute used the word "suits" and the Constitution used the word "cases."

¹⁵ *Metcalf v. Watertown*, 128 U.S. 586 at 588, 9 S.Ct. 173 (1888).

"Where, however, the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character; . . . It cannot retain it in order to see whether the defendant may not raise some question of a Federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction, at the commencement of the suit, is not cured by an answer or plea which may suggest a question of that kind."¹⁶

The Court is correct in holding that a federal question must exist before the circuit court has power to hear a case, but it is wrong in holding that the federal question must appear in the petition because all jurisdictional requirements do not have to be met at the time the petition is filed.

Jurisdictional requirements have to be satisfied only prior to the time the question of jurisdiction is raised or, if the question is not raised, prior to the rendition of judgment. Jurisdiction of the person seldom exists at the time the complaint is filed. Yet a court has jurisdiction of a case when the defendant is served with process even though the service is made after the complaint is filed. Jurisdiction of the subject matter may be obtained even after the complaint is filed. This has been recognized by the Supreme Court in diversity of citizenship cases. In *Conolly v. Taylor*¹⁷ federal jurisdiction did not exist at the time the action was filed because the necessary diversity did not exist. However, the plaintiff cured this defect by striking out the name of one party. The court then assumed jurisdiction and tried the case on its merits. This action by the trial court was approved by the Supreme Court. In a similar case, *Drumright v. Texas Sugarland Company*, a circuit court of appeals stated: "Though the original bill was not maintainable, because one of the plaintiffs therein was a citizen of the same state of which a defendant was a citizen, the jurisdictional defect could be removed, and the cause be proceeded with, following a dismissal of the bill as to that plaintiff."¹⁸ Even in the *Metcalf* case the Supreme Court recognized that jurisdiction could be obtained after a case was filed, because, in reversing the case, the Court said: "It will be for the court below to determine whether the pleadings

¹⁶ *Id.* at 509.

¹⁷ 2 Pet. (27 U.S.) 556 (1829).

¹⁸ (C.C.A. 5th, 1927) 16 F.(2d) 657 at 657-658.

can be so amended as to present a case within its jurisdiction."¹⁹ Since the plaintiff can cure jurisdictional defects after the action has been brought, by amending his petition, the defendant should be able to cure them with his answer because "A case in law or in equity consists of the right of the one party, as well as of the other."²⁰

Since all jurisdictional requirements do not have to be met at the time a complaint is filed, it is not necessary for a complaint to show that they have been met. It is sufficient if the record shows that the jurisdictional requirements have been satisfied prior to the time the question of jurisdiction is raised. In diversity cases the Supreme Court holds that the whole record should be examined to determine if the jurisdictional requirements have been met. In *Gordon v. Third National Bank* the Court stated:

"The question of jurisdiction is raised for the first time in this court, and as we are of the opinion that the diverse citizenship of the parties appears affirmatively and with sufficient directness from the record, of which the summons forms a part, we must decline to reverse the judgment on this ground. . . ."²¹

In *Sun Printing and Publishing Assn. v. Edwards* the Supreme Court expressed the same view, stating:

"The whole record, however, may be looked to, for the purpose of curing a defective averment of citizenship, where jurisdiction in a Federal court is asserted to depend upon diversity of citizenship, and if the requisite citizenship, is anywhere expressly averred in the record, or facts are therein stated which in legal intendment constitute such allegation, that is sufficient."²²

In federal question cases the court should follow the same procedure. If the whole record shows that federal issues are raised, the court should have the power to hear the case because jurisdiction can vest after the action is filed. Also, neither the Constitution nor the judicial code prevent the assumption of jurisdiction if the case actually contains federal issues.

In his article entitled "Reappraisal of Federal Question Jurisdiction"²³ Mr. Bergman indicates that he agrees with the *Metcalf* case but for a different reason. He stated that Congress did not intend that

¹⁹ 128 U.S. 586 at 590.

²⁰ 6 Wheat. (19 U.S.) 264 at 379 (1821).

²¹ 144 U.S. 97 at 103, 12 S.Ct. 657 (1892).

²² 194 U.S. 377 at 382, 24 S.Ct. 696 (1904).

²³ 46 MICH. L. REV. 17 (1947).

every federal question case be tried initially in a federal court. "It was the purpose and intent of Congress in 1875 to insure that every federal question case likely to be prejudiced in a state court could find a ready and impartial forum in the federal courts."²⁴ He then stated that prejudice is more likely to occur when the plaintiff raises a federal question than when the defendant raises one.²⁵ Therefore, Congress intended that the jurisdiction of the district courts be limited to cases where the federal claim appeared in the plaintiff's petition. This position is indefensible because there is nothing to show that there is more likely to be prejudice if the federal question is raised by the plaintiff than by the defendant. Who is to be prejudiced, the plaintiff? If it is the plaintiff, why can the defendant remove a case to a federal court? Is the defendant the one who is likely to be prejudiced if the plaintiff raises a federal question? If so, why is the plaintiff permitted to bring the case originally in a federal court? Since both parties can have a federal question raised by the plaintiff tried in a federal court, it seems that both are prejudiced when the plaintiff raises a federal question.

Assuming that federal question jurisdiction is based on prejudice, there is nothing to show that there is more likely to be prejudice to a party if a federal question is raised by the plaintiff than if one is raised by the defendant. However, the amendments of 1887-1888 seem to refute the theory that federal question jurisdiction is based on prejudice because these amendments permit any defendant, regardless of residence, to remove a federal question case and only non-resident defendants to remove diversity of citizenship cases. Congress did not intend that every federal question case be tried initially in a federal court, but as previously stated, Congress did intend to make the federal courts available to every case that contained federal issues.

The holding that the district courts can only assume jurisdiction of a federal question case if the federal question is raised in the petition deprives defendants of their right to have federal questions that are raised in the answer tried initially in a federal court. In addition, this holding makes federal jurisdiction depend on which party sues first. In *Tennessee v. Union and Planters' Bank*²⁶ the state of Tennessee

²⁴ *Id.* at 45.

²⁵ "The presumption is that the plaintiff is the principal injured party, and although it is conceivable that prejudice will arise where the federal question is raised in the defendant's answer, it is much more likely to occur where the plaintiff seeks affirmative recovery." *Id.* at 37.

²⁶ 152 U.S. 454, 14 S.Ct. 654 (1894).

brought suit in a federal court to collect a state tax from the defendant bank. The answer alleged that the collection of this tax was prohibited by a federal statute. Yet the Court held that federal jurisdiction did not exist because the plaintiff did not base his claim on a federal right. If the bank had sued first to enjoin the collection of the tax because it conflicted with the federal statute, federal jurisdiction would have existed.²⁷ Thus each party does not have an equal right to have a federal question litigated initially in a federal court. The holding that federal jurisdiction exists only if a federal question is raised in the petition also causes unnecessary litigation of cases because it requires a court to reverse and either dismiss or remand a case after it has been tried on its merits, even though it contains a federal question, if the federal question was raised by the defendant.²⁸ Therefore, the present holding should be changed so that the district courts would have jurisdiction of a case if the answer raised federal issues.

A. Federal Question In Complaint

When a case is originally brought in a district court, the federal issue test cannot be used to determine if the plaintiff's action arises under the Constitution or the laws of the United States because this test requires the court to consider both the petition and the answer. If the answer were considered, the defendant could deprive the plaintiff of his right to sue in a federal court by raising non-federal issues so that the case would have to be dismissed. In fact, the defendant could safely raise non-federal issues that he could not defend if the action would be dismissed as a result. Therefore, the Supreme Court has held that the answer should not be considered in determining if the plaintiff's action is within the federal question jurisdiction of the federal courts. In *Osborn v. Bank of the United States* the Court stated: "The right of the plaintiff to sue, cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action

²⁷ Also, to see the effects of the present rule, compare *Hopkins v. Walker*, 244 U.S. 486, 37 S.Ct. 711 (1917) with *Marshall v. Desert Properties Co.*, (C.C.A. 9th, 1939) 103 F. (2d) 551.

²⁸ *Tennessee v. Union and Planters' Bank*, 152 U.S. 454, 14 S.Ct. 654 (1894). However, the court will examine the whole record to determine if an exclusive federal question is being removed. *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.*, 258 U.S. 377, 42 S.Ct. 349 (1922).

is brought."²⁹ In this case the plaintiff based his right to sue on an act of Congress but the defendant raised only non-federal issues for trial. However, the Supreme Court held that federal jurisdiction existed because the complaint showed that federal issues could be raised. Thus a plaintiff may bring an action in a federal district court if his complaint, or at least the essential allegations of his complaint,³⁰ indicates that it is possible for the defendant to raise federal issues.³¹

It is frequently stated that federal jurisdiction exists if a plaintiff's claim is based on a right created by the Constitution or a federal law. ". . . when the complaint asserts a right created by federal law, it presents a suit which *may properly* turn upon a construction of that law; and such a suit 'arises out of' the law for purposes of federal jurisdiction."³² However, the federal right must be so fundamental to the plaintiff's claim that the defendant will probably dispute it. Jurisdiction cannot be based on a remote federal right. In *Gully v. First National Bank in Meridian*, Mr. Justice Cardozo said: "To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible."³³ This is a difficult test to apply because often it is impossible to determine what questions are necessary and what are merely possible until after the defendant has answered;³⁴ however, because the plaintiff's right to sue must be determined from only his complaint, this test must be used.

The fact that federal question jurisdiction exists if the complaint shows that federal issues could be raised does not mean that federal question jurisdiction should not exist if the complaint does not indicate that federal issues are possible because even then the answer could actually raise federal issues. Therefore if the complaint does not raise a federal question, the court should consider the answer to see if it raises federal issues. The reason why the court cannot consider the

²⁹ 9 Wheat. (22 U.S.) 738 at 824 (1824). Even in this case the dissent held that federal issues must actually exist for the case to arise under the Constitution or laws of the United States. For a discussion of this case see Bergman, "Reappraisal of Federal Question Jurisdiction," 46 MICH. L. REV. 17 at 18-27 (1947).

³⁰ *Louisville and Nashville R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42 (1908); *Tennessee v. Union and Planters' Bank*, 152 U.S. 454, 14 S.Ct. 654 (1894).

³¹ *Gully v. First National Bank in Meridian*, 299 U.S. 109, 57 S.Ct. 96 (1936); *Osborn v. Bank of the United States*, 9 Wheat. (22 U.S.) 738 (1824).

³² *McGoon v. Northern Pacific Railway Company*, (D.C.N.D. 1913) 204 F. 998 at 1005.

³³ 299 U.S. 109 at 118, 57 S.Ct. 96 (1936).

³⁴ See Chadbourne and Levin, "Original Jurisdiction of Federal Questions," 90 UNIV. PA. L. REV. 639 at 670 (1942).

answer when the plaintiff pleads a federal question does not exist when the plaintiff does not plead a federal question. If the plaintiff does not plead a federal question, there is no incentive for the defendant to raise fictitious issues in order to have the case dismissed because he can achieve this result by merely questioning the jurisdiction of the court. However, should the defendant raise federal issues in his answer, he is raising issues that he must be able to defend.

The *Osborn* case does not prevent a court from considering the answer if the plaintiff does not plead a federal question. That case did not determine that a plaintiff has a right not to be sued in a federal court if the complaint does not contain a federal question. It held only that a court cannot look at the answer if the effect would be to deprive a plaintiff of his right to sue in a federal court. A case that holds that the existence of federal jurisdiction cannot be defeated by an answer that raises non-federal issues cannot be cited as authority for the proposition that federal jurisdiction cannot be invoked if the answer raises federal issues.³⁵ Thus, when a case is originally brought in a federal district court, federal question jurisdiction should exist if either the plaintiff bases his claim on a federal right or the defendant raises federal issues for trial. If a plaintiff does not raise a federal question and the defendant questions the jurisdiction of the court, the case should be dismissed, but if instead of questioning the jurisdiction of the court the defendant files an answer that raises a federal question, jurisdiction should exist.

B. Removal Cases

In *Railroad Company v. Mississippi* the Supreme Court held that a case could be removed to a federal court if federal issues were raised by the defendant. This case was decided in 1880 under the Act of 1875. This act was amended in 1887-1888.³⁶ After this amendment the Supreme Court held in *Tennessee v. Union and Planters' Bank*, which was decided in 1894, that a case could not be removed, even though it contained federal issues, unless the federal question was raised in the petition.

³⁵ In *Tennessee v. Union and Planters' Bank*, 152 U.S. 454, 14 S.Ct. 654 (1894), the Court suggested that the *Osborn* case prevented the court from basing federal jurisdiction on a federal question in the answer. One recent article in commenting on this stated that "Marshall was invoked to defeat himself." Chadbourn and Levin, "Original Jurisdiction of Federal Questions," 90 UNIV. PA. L. REV. 639 at 654 (1942).

³⁶ The Act of 1875 was amended in 1887, 24 Stat. 552. Technical errors in this act were corrected by the Act of 1888, 25 Stat. 433.

The removal section of the Act of 1875 was complete in itself. It provided what cases could be removed, who could remove them, and what jurisdictional minimum was needed for removal. No reference was made to the section on original jurisdiction as none was necessary. When this act was amended in 1887-1888, the provisions as to who could remove a case were changed. The Act of 1875 permitted either party to remove diversity and federal question cases, whereas the amended act permitted only the defendant to remove a federal question case and only a non-resident defendant to remove a diversity case. This change made it necessary to re-write the whole removal section. The new section omitted any reference to a jurisdictional minimum and added the phrase that any suit "of which the Circuit Courts of the United States are given original jurisdiction by the preceding section could be removed."³⁷

The Supreme Court held that these amendments were made for the purpose of reducing the scope of removal jurisdiction so that it would be the same as the original jurisdiction of the inferior federal courts. Therefore, the Court held that the rule used in original jurisdiction cases—that the circuit courts only had jurisdiction if the federal question was raised in the petition—must be used in removal cases. However, Congress could not have intended this result because at the time the Acts of 1887-1888 were passed it was not known that the rule applicable to removal cases was different from the one that was applicable to cases that were originally filed in a federal court. *Metcalf v. Watertown*, which was decided in 1888, was the first case to hold that a court could look only at the complaint in original jurisdiction cases to determine if a federal question existed even though it could look at the whole record in removal cases. The decision in this case was delivered twenty-one months after the Act of 1887 was passed and four months after the Act of 1888 was passed. In deciding the *Metcalf* case the Court contrasted the procedure used in cases originally filed in federal courts with the procedure used in removal cases. In fact, the Court spoke as if it was still permissible for a court to examine both the complaint and the answer to determine if a removal case contained a federal question. If Congress had changed the method of determining the existence of a federal question in removal cases only a short time before the *Metcalf* case was decided, the Court would probably

³⁷ The present section reads "of which the district courts of the United States have original jurisdiction." 62 Stat. L. 869 (1948), 28 U.S.C.A. (1948) §1441(a).

have mentioned that fact. It seems that what Congress intended by the Acts of 1887-1888 was clearer in 1894 than in 1888!

Changing the statute so that a federal question case could be removed only by a defendant instead of by either party does not indicate that Congress intended to reduce the number of cases in federal courts because after this change was made a plaintiff could bring just as many actions in a federal court as he could before this amendment. The change merely indicates that Congress did not wish to give the plaintiff a second chance to pick his forum. He would have to bring his actions directly in a federal court; he could not bring them in a state court and then remove them to a federal court. If Congress had wished to limit the number of cases that could be removed, it would have chosen a more logical method than one that would make federal jurisdiction depend on pleading.

The Supreme Court did suggest that Congress made this change to prevent removal where the federal question raised by the defendant "[might be a very small part] of the defendant's plea."³⁸ However, if Congress had wanted to prevent federal jurisdiction from being based on a remote federal question, it would have adopted a method that would have prevented the specific evil feared, not one that would deny jurisdiction in every case where a federal question was raised by a defendant. The phrase "of which the Circuit Courts of the United States are given original jurisdiction" was added so that removal cases would have to contain the same jurisdictional minimum that was required of original jurisdiction cases. This was pointed out in the dissent to the *Union and Planters' Bank* case.³⁹ Thus no change in the method of determining the existence of a federal question was intended by the Acts of 1887-1888. Therefore the Supreme Court is wrong in holding that under the present statute the existence of a federal question in removal cases must be determined from only the complaint.

Federal question cases should be removed only if the whole record indicates that the decision depends on an interpretation of the Constitution or a law of the United States. Thus, federal issues should actually exist; a case should not be removed just because a federal question is raised in the petition even though this would be sufficient to confer jurisdiction if the case were originally brought in a federal

³⁸ *Tennessee v. Union and Planters' Bank*, 152 U.S. 454 at 462, 14 S.Ct. 654 (1894).

³⁹ *Id.* at 471. It has been stated that "Harlan's is one of those dissents of yesterday which deserve to become the law of today." Chadbourn and Levin, "Original Jurisdiction of Federal Questions," 90 *Univ. Pa. L. Rev.* 639 at 673 (1942).

court. The reason that makes it necessary to consider only the petition when an action is brought originally in a federal court does not exist in removal cases because in removal cases no question of depriving a plaintiff of his right to sue in a federal court exists. The plaintiff waived this right when he voluntarily sued in the state court. Also, there is no necessity for the defendant in a removal case to raise fictitious issues to defeat federal jurisdiction. If he does not want the case tried in a federal court, he does not have to remove the case. Moreover, there is no way the defendant can get the case dismissed. Should he remove the case and then raise non-federal issues the case would not be dismissed but would be remanded to the state court for a trial on those issues.

The scope of removal jurisdiction is not broadened by permitting the removal of cases that contain federal issues, even though these issues are raised by the defendant, because these cases do arise under the Constitution or laws of the United States. Also, the number of cases that could be removed to federal courts would not be increased if removal were limited to those cases that actually contain federal issues.

Since federal question cases should be removed only if they actually contain federal issues, Congress should change the procedure for removing cases of this type. They should not be removed until after the answer is filed; then either party should have the same right to remove them.⁴⁰ If the defendant can remove a case when the answer raises federal issues, the plaintiff should also be able to remove the case. When it makes these changes, Congress should not change the procedure for removing diversity cases, because it is satisfactory. Also, there is no reason why the procedure should be the same for both types of cases.

II

Removal of Exclusive Jurisdiction Cases

Although Congress has provided that cases that could originally be filed in a federal district court may be removed from a state court to a federal court, the Supreme Court does not permit the district courts to assume jurisdiction of such cases if they are within the exclusive jurisdiction of the federal courts.⁴¹ The Court holds that removal jurisdic-

⁴⁰ See Chadbourn and Levin, "Original Jurisdiction of Federal Questions," 90 *UNIV. PA. L. REV.* 639 at 674 (1942).

⁴¹ *Minnesota v. United States*, 305 U.S. 382 at 389, 59 S.Ct. 292 (1939); *General Investment Co. v. Lake Shore and Michigan S. Ry. Co.*, 260 U.S. 261 at 288, 43 S.Ct. 106 (1922); *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.*, 258 U.S. 377 at 382, 42 S.Ct. 349 (1922).

tion is a derivative jurisdiction, and since a state court cannot have jurisdiction of a case that is within the exclusive jurisdiction of the federal courts, a federal court cannot have jurisdiction of such a case after it has been removed. Even though the plaintiff may immediately start the case anew in a federal court, it must be dismissed. In *Lambert Run Coal Company v. Baltimore & Ohio Railroad Company*, the Court stated:

"The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction."⁴²

The holding that removal jurisdiction is a derivative jurisdiction is not required by either the Constitution or the judicial code because they do not limit the right of removal to cases that are within the jurisdiction of the court from which the case is removed. The Constitution permits Congress to give the inferior federal courts the power to hear certain classes of cases. A case within one of these classes cannot exist in such a status that Congress cannot authorize the federal courts to hear it. Nothing in the Constitution requires that these cases be commenced in a certain way. They may be filed originally in a federal court, or they may be removed from a state court to a federal court even though the state court has assumed jurisdiction of them. The power to remove a case from a state court is not expressly granted by the Constitution, but cases are removed in order to give full effect to the power of federal courts over certain types of cases. For the same reason the federal courts could be empowered to hear cases that are within these designated classes if they are removed from a state court even though they are not within the jurisdiction of the state court.

Congress has authorized the federal courts to assume jurisdiction over all cases filed in state courts that could have been brought originally in a federal court. This power over cases filed in state courts was not limited to cases that were within the jurisdiction of the state court. Also no distinction was made between concurrent and exclusive jurisdiction cases; the federal courts were given power over both on removal. Congress provided in the judicial code that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed . . . to the district court of the United States."⁴³ The code does provide that a case must

⁴² 258 U.S. 377 at 382, 42 S.Ct. 349 (1922).

⁴³ 62 Stat. L. 869 (1948), 28 U.S.C.A. (1949) § 1441(a).

be "brought" in a state court before it can be removed, but this means only that the case must have been filed in a state court.⁴⁴ It does not mean that the state court must have the power to proceed to a trial on the merits. The Supreme Court has interpreted the judicial code as if it read "brought in a state court of competent jurisdiction."

The removal section of the Judiciary Act of 1875 provided "that any suit . . . now pending or hereafter brought in any State court . . . and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, . . . either party may remove said suit into the circuit court of the United States for the proper district."⁴⁵ In discussing this act the Supreme Court said in *Metcalf v. Watertown* that "the right of removal under the Act of 1875 could not be made to depend upon a preliminary inquiry as to whether the plaintiff had or had not the right to sue in the state court of original jurisdiction from which it was sought to remove the suit."⁴⁶ If removal jurisdiction was not a derivative jurisdiction under the Act of 1875 it should not be held to be a derivative jurisdiction under the present act because the provisions of the two acts are so similar.

The holding that removal jurisdiction is a derivative jurisdiction is based on a misinterpretation of statements that were previously made by the Supreme Court in a different type of case. When deciding that a defendant did not waive his right to question the service of process by removing a case to a federal court, the Supreme Court stated that the federal court took the case as it stood in the state court.⁴⁷ The statement that the federal court took the case as it stood in the state court only means that the filing of the removal petition is not a general appearance so that defects in the service of process are not waived; it does not mean that removal jurisdiction is a derivative jurisdiction. This is indicated by the fact that if there were defects in the service of process the state court could not have had jurisdiction of the case, and therefore, if removal jurisdiction was a derivative jurisdiction, the federal court could never acquire jurisdiction of the case. But the federal court can acquire jurisdiction in spite of the fact that there were defects in the service of process prior to the removal of the case if the defendant

⁴⁴ *Mill Creek and Minehill Nav. & R. Co. v. United States*, 246 F. 1013 (1917).

⁴⁵ 18 Stat. L. 470, § 2 (1875).

⁴⁶ 128 U.S. 586 at 589, 9 S.Ct. 173 (1888).

⁴⁷ *Goldrey v. Morning News*, 156 U.S. 518, 15 S.Ct. 559 (1895). The Court said (at 525) that the defendant could raise every defense that he could have if the case "had been originally commenced in said circuit court."

appears generally in the federal court. After such an appearance, the defendant cannot question the jurisdiction of the federal court.

The Supreme Court itself has recently cast some doubts on the rule that removal jurisdiction is a derivative jurisdiction. In *Freeman v. Bee Machine Company, Inc.*, it stated, "We see no reason in precedent or policy for extending that rule so as to bar amendments to the complaint, otherwise proper, merely because they could not have been made if the action had remained in the state court."⁴⁸ Thus the Court states that it is refusing to extend the holding that removal jurisdiction is derivative. However, the facts of the *Freeman* case indicate that the Supreme Court has really overruled this doctrine because the plaintiff was permitted to amend his complaint after removal so as to include a cause of action that he could not have included if the case had remained in the state court.

Since there is no reason for holding that removal jurisdiction is a derivative jurisdiction the Supreme Court should reject the doctrine. At least the Court should permit the removal of cases that are within the exclusive jurisdiction of the federal courts. This may broaden the scope of removal jurisdiction, but it would not increase the number of cases tried by the federal courts. In fact, the work of the federal courts would be reduced because they would not have to dismiss a case that could immediately be brought in a federal court.

The only questions that a person should be permitted to raise in a federal court in a removal case are ones that could have been raised if the case had originally been filed in a federal court. Some of these will be the same as ones that could have been raised in the state court before removal, as the question of jurisdiction over the person, but a party should not be permitted to question the jurisdiction of the state court after a case has been removed. If either party wishes to question the jurisdiction of a state court on a point that would not be a defect if the case were originally filed in the federal court, he should do his questioning in the state court. The state courts are usually as competent as the federal courts to determine the limits of their own jurisdiction. To permit persons to remove cases for the purposes of questioning the jurisdiction of a state court gives the inferior federal courts a supervisory control of state courts that is not authorized by the Constitution or the judicial code.

Neither party is harmed by not being able to question the jurisdiction of the state court after a case has been removed. The plaintiff

⁴⁸ 319 U.S. 448 at 451, 63 S.Ct. 1146 (1943).

is not being harmed by having his case moved to the proper forum, and the defendant cannot claim that he is being harmed because he voluntarily removed the case when he could have asked the state court to dismiss it. Also, the plaintiff should not be permitted to question the venue of the court to which an exclusive federal question case is removed if it is the court for the district and division for the place where the action is filed⁶⁰ because he selected the geographical place of trial. The defendant should not be able to get the case dismissed because of any venue question. If he wished the case to be tried elsewhere he should have asked the state court to dismiss it. However, the defendant could seek to obtain a change of venue after the case is removed.⁶¹

If the Supreme Court does not change its present holding but continues to assert that removal jurisdiction is a derivative jurisdiction, it should at least hold that the lack of state jurisdiction could be waived if the parties proceed to trial. Thus if such a case is tried on its merits in a federal court, another trial should not be necessary. The reasoning used by the circuit court of appeals in a diversity case that was improperly removed to a federal court should be applicable. In that case, the jurisdiction of the federal court was upheld because the case could have originally been filed in a federal court and because the question of jurisdiction was not raised prior to the trial. In delivering the opinion of the court Judge Learned Hand stated:

"However, though the action was not removable, the District Court got jurisdiction over it, if both parties agreed, as they did. In such a case the mutual consent, so evidenced, does not confer substantive jurisdiction, as of course it cannot, but the resulting situation is equivalent to initiating an action in the District Court in which the defendant appears. . . . We conclude therefore . . . that when the plaintiff goes to trial without asking for a remand, the cause being one of which the statute gives the court jurisdiction, it may proceed to judgment."⁶¹

Conclusion

The Supreme Court has limited the jurisdiction of the district courts beyond what is required by the Constitution and the judicial code. These limitations should be removed. The district courts should have original jurisdiction of a case if either party pleads a federal ques-

⁶⁰ 62 Stat. L. 869 (1948), 28 U.S.C.A. (1948) § 1441(a).

⁶¹ 62 Stat. L. 869 (1948), 28 U.S.C.A. (1948) § 1404(a).

⁶¹ *Bailey v. Texas Co.*, (C.C.A. 2d, 1931) 47 F. (2d) 153 at 155; *Baggs v. Martin*, 179 U.S. 206, 21 S.Ct. 109 (1900).

tion. Also, the district courts should have jurisdiction of a case that is removed from a state court if federal issues are to be litigated regardless of whether the federal court has exclusive or concurrent jurisdiction of those issues.

Should the Supreme Court believe that it is unable to change its present holdings because Congress has re-enacted the judicial code without changing them, Congress should make the necessary changes by amending the judicial code. To permit a court to assume jurisdiction of a case if there is a federal question in the answer, section 1331 of the judicial code should be amended to provide that the district courts should have original jurisdiction if the pleadings of either party show that the action arises under the Constitution, laws or treaties of the United States.⁵² To permit the removal of cases that involve federal issues, section 1441(b) of the judicial code should be amended so that the phrase "of which the district courts have original jurisdiction" should not apply to federal question cases. Then a jurisdictional minimum would have to be added to that section. Congress should also change the word "brought" to "filed" so that exclusive federal question cases could be removed. In addition Congress should change the removal procedure so that federal question cases could not be removed until after the answer was filed; then either party should have the right to remove a case that contained federal issues. This would necessitate amending sections 1441 and 1446 of the judicial code.⁵³

⁵² Section 1331 should be amended to read: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs, if the pleadings of either party indicates that the action arises under the Constitution, laws or treaties of the United States."

⁵³ Subsections (a) and (b) of section 1441 should be amended as follows:

"(a) Except as otherwise expressly provided by Act of Congress, any civil action filed in a State court wherein the matter in controversy exceeds the sum or value of \$3,000, exclusive of interests and costs, may be removed by either party to the district court of the United States for the district and division embracing the place where such action is pending if the pleadings of both parties show that the action arises under the Constitution, laws or treaties of the United States.

"(b) Any other civil action filed in a State court of which the district courts of the United States have original jurisdiction may be removed by the defendant or defendants to the district court of the United States for the district and division embracing the place where such action is pending if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

Subsection (a) of section 1446 should be amended by substituting the phrase "party or parties" for the phrase "defendant or defendants."

Subsection (b) of section 1446 should be amended to read:

"If the action arises under the Constitution, laws or treaties of the United States, the petition for removal must be filed within ten days after the plaintiff receives through service or otherwise the defendant's answer or other pleading setting forth the defense that the defendant will make, or within ten days after the time expires for the defendant to file his answer or other pleading setting forth the defense the defendant will make if such

Even if it is assumed that the Supreme Court is correct in its interpretation of the judicial code, Congress should make these amendments so that the inconsistencies and defects that have appeared under the present law would be removed. Federal jurisdiction should not depend on pleading. The district courts should have jurisdiction of a case that contains a federal question no matter which party brings the action. Also, after federal issues have been litigated in a federal court, a case should not be reversed because the federal issues were raised by the defendant.

pleading is filed in court and is not required to be served on the plaintiff, whichever period is shorter.

"In all other cases the petition for removal of a civil action or proceeding shall be filed within twenty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within twenty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

"If the case stated by the initial pleading is not removable, a petition for removal may be filed within twenty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable."

Subsections (d) and (e) of section 1446 should be amended by substituting the phrase "party or parties who are removing the action" for the phrase "defendant or defendants."



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December 7, 1984

Honorable Mike Synar
House of Representatives
1713 Longworth House Office Building
Washington, D.C. 20515

Dear Mike:

Thank you for sending me a copy of ASCAP's Copyright Law Symposium. The subjects of the articles are very interesting, and I am anxious to read them. But first, I must finish grading bluebooks.

Some time ago we discussed the desirability of amending the Judicial Code to provide that a federal court would have jurisdiction to hear an action that is within the exclusive jurisdiction of a federal court which is filed in a state court and removed to the federal court. At the present time, federal cases hold that a federal court has jurisdiction on removal if the state court had jurisdiction of the action, and a state court does not have jurisdiction if the action is within the exclusive jurisdiction of the federal courts. Thus, if an action that is within the exclusive jurisdiction of a federal court is filed in a state court and removed to a federal court, the federal court must dismiss it although it can be filed in the federal court immediately.

Is there any prospect for such an amendment being enacted? Phebe and I wish you a happy holiday season.

Respectfully,

A handwritten signature in cursive script that reads "George B. Fraser".

George B. Fraser

GBF:dc

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MIKE SYNAR
26 DISTRICT BUILDING
WASHINGTON, DC 20515
LEGISLATIVE
OFFICE AND COMMERCIAL
COUNCIL
GOVERNMENT OPERATIONS
SELECT COMMITTEE
ON BANKRUPTCY

WASHINGTON OFFICE
2401 KENNEDY FEDERAL OFFICE BUILDING
WASHINGTON, DC 20515
202-225-2751

LEGISLATIVE OFFICE
2027 FEDERAL BUILDING
725 SOUTH MAIN STREET
MANASSAS, VA 20108
703-351-2530

Congress of the United States
House of Representatives
Washington, DC 20515

February 18, 1995

Prof. George Fraser
LAW CENTER
University of Oklahoma
300 West Timberdell
Norman, Oklahoma 73019

Dear George:

Thank you very much for your thoughtful letter. I apologize for taking so long to respond. I remember our visit about the removal issue and I want to followup.

George, I've retained my seat on the Judiciary Committee's Subcommittee on Courts. Consequently, I'm in a good position to help resolve the problem you've outlined. I'd like to ask your help in two ways.

First, while I understand the problem intellectually -- a federal case wrongly filed in state court cannot be removed directly to a federal court -- I am not clear as to the need to remedy it. If I were to suggest legislation to my colleagues, their first question would be the same as mine: Why do we need to do this?

You can help me by putting together some facts and examples to demonstrate the need for action. The Judiciary Committee is sensitive to the cost and time of litigation. I suspect there are statute of limitation difficulties and other hurdles created by this problem that add up to a serious burden on private litigants.

Second, I would appreciate a draft of legislation. I can't promise that we'll be able to pursue the matter but we should get ready. Call Vince here in my Washington office if you need any help (I know we call you often enough). I've enclosed a copy of our hearings last year on the Rules Enabling Act. This will be good background for you.

We'll look to hear from you. On a personal note, I hope you're well and Phebe too. John TeSelle has helped us out again on bankruptcy legislation -- this time to relieve farmers. Give my best wishes to everyone.

Sincerely,

MS/v1

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The
University of Oklahoma

COLLEGE OF LAW
300 Timberdell Road
Norman, Oklahoma 73019
(405) 325-4699

March 11, 1985

Honorable Mike Synar
2441 Rayburn House Office Building
Washington, D.C. 20515

Dear Mike:

The Supreme Court has held that removal jurisdiction is derivative. Therefore, if an action that is within the exclusive jurisdiction of the federal courts is brought in a state court, the state court does not acquire subject matter jurisdiction to hear it. Moreover, if the action is removed to a federal court, the federal court does not acquire jurisdiction to hear it; the action must be dismissed notwithstanding the fact that (a) it could have been brought in a federal court originally and (b) the plaintiff can immediately refile it in a federal court. Lambert Run Coal Co. v. Baltimore & Ohio Rd., 258 U.S. 377, 42 S.Ct. 349 (1922). This creates an unnecessary delay in the disposition of the action and involves additional expense and paper work for the parties and the federal court. For this reason, this rule has been criticized by all of the authorities in the field of federal jurisdiction.

"With deference, we suggest that such a rigid rule of dismissal is unwarranted and should be abandoned." J. Moore & B. Ringle, 1A Moore's Federal Practice ¶ 0.157[3.-2], pp. 58-59 (1983). Earlier Professor Moore stated that "Practical judicial administration can look with little favor upon this technical and subtle doctrine." Moore's Commentary on the U.S. Judicial Code 219 n.6 (1949).

Similarly, "This result has been the subject of a great deal of deserved criticism, a recent illustration being the following statement of Judge Duniway in State of Washington v. American League of Professional Baseball Clubs:

This is the kind of legal *tour de force* that most laymen cannot understand, particularly in a case where the federal court not only has subject matter jurisdiction, but has exclusive subject matter jurisdiction. One would have thought that the purpose of removal in such a case is to get the case out of the court that lacks jurisdiction to hear it and into the court that has jurisdiction, and to keep it in the latter court, so that it can be tried and a valid judgment can be entered." 460 F.2d 654, 658-59 (9th Cir. 1972).

C. Wright, A. Miller & E. Cooper, 14 Federal Practice and Procedure 575-76 (1976).

In 1968 the American Law Institute completed a study of the jurisdiction of the federal courts. Among other proposals, it recommended that the above rule be changed. "This subsection [§ 1312(d)] changes that rule, which seems entirely wasteful in its effect." American Law Institute, Study of the Division of Jurisdiction Between State

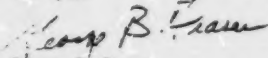
and Federal Courts 207 (1969). In discussing the ALI proposal Professor Wright stated that "We also addressed ourselves to the strange rule that a case exclusively within federal jurisdiction may not be removed from state to federal court." C. Wright, Restructuring Federal Jurisdiction: The American Law Institute Proposals, 26 Wash. & Lee L. Rev. 185, 201 (1969).

The problem can be cured by adding three words to Section 1441 (b) of Title 28 of the U.S. Code. This subsection should be amended to read as follows:

(b) Any civil action of which the district courts have original exclusive or concurrent jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

Should you have any questions about this proposal, please contact me.

Sincerely,



George B. Fraser
Boyd Professor of Law Emeritus

GBF:dc

LETTERS

Streamlining Federal Procedure

Those of you who improved your grades in first-year civil procedure by remembering obscure footnotes in the textbook will undoubtedly be disappointed that at least one such provision may be moot as a result of legislation (H.R. 2446) I recently introduced in the House of Representatives. Currently, if a defendant sued in the state court on an exclusive federal question wants to remove the case to the proper federal forum, he may do so, but the federal court must immediately dismiss the action, and plaintiff must file all over again in the same court.

H.R. 2446 will permit federal district courts to hear and determine claims raising exclusively federal questions filed in state courts and removed by defendants for further proceedings without the necessity of dismissal and refiling in the federal court. While only a handful of cases are affected by this rule each year, the problem is nevertheless a real, if minor, irritant.

In 1875, Congress provided broad removal jurisdiction for the federal district courts to give defendants the option of a federal forum in suits raising federal questions, and to endow the federal courts with the full authority intended by Congress to hear and adjudicate questions of federal law. Removal works as Congress designed—provided the subject matter jurisdiction of the state action is concurrent in both the state and federal courts. If, however, jurisdiction over the particular subject matter of the action is exclusive in the federal court, then a problem arises. A defendant wishing to remove the action to the proper federal forum may do so, but the federal court must dismiss the action—even though plaintiff can refile the action there immediately and even though the federal court is the only tribunal legally competent to hear the case.

This result stems from the Supreme Court's 1922 decision in *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.*, 258 U.S. 177. There, the Court held that removal jurisdiction is "derivative," that is, a federal court to

which a defendant removes a state court action derives jurisdiction over the action from the state court. In practical terms, a federal court can derive jurisdiction over the subject matter of a removed action only where the federal and state courts share concurrent jurisdiction over the federal issues involved. Where subject matter jurisdiction is exclusive in the federal courts, such as in antitrust, copyright, and patent, on removal federal courts cannot acquire subject matter jurisdiction over the actions from state courts because the state courts never had any jurisdiction. In those situations the federal court has no choice, under *Lambert Run*, but to dismiss and force the parties to start all over.

This rule makes no practical or logical sense. To require dismissal and refiling of these actions when the parties are already in court desiring to proceed is a wasteful and unproductive use of litigants' and courts' time and money. Only defendants can remove actions; defendants not wishing to expedite claims against them will seek dismissal in the state court for lack of subject matter jurisdiction. Those defendants wishing to proceed may do so, after this legislation, without losing time and money by having to start all over in the federal court. Also, the rule penalizes plaintiffs whose attorneys mistakenly file in the wrong court when defendant is willing to remove the case to the proper forum.

One of my former law professors, George Fraser of the University of Oklahoma, and other commentators have long urged the courts to abandon this unproductive rule. I am grateful to Professor Fraser for bringing this matter to my attention and for his assistance in drafting legislation to solve the problem.

H.R. 2446 has been referred to the House Judiciary Committee, on which I sit. I hope ATLA members can support this legislation to help ensure its quick passage.

Mike Synar
U.S. Representative (D-Oklahoma)
Member, Committee on the Judiciary
Washington, D.C.

TRIAL, September 1981

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APPENDIX V

**ADDITIONAL MATERIALS RELATING TO FILING FEES IN THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STATEMENT

OF

**AUBREY E. ROBINSON, JR.
CHIEF JUDGE OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BEFORE

THE

**SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES
AND THE ADMINISTRATION OF JUSTICE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES**

CONCERNING

**H.R. 2724 - FEES AND COSTS IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JULY 31, 1985

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Mr. Chairman and Members of the Subcommittee:

I am pleased to present my views in support of H.R. 2724 which would amend section 1914 of Title 28, United States Code, to make the fees charged in the United States District Court for the District of Columbia the same as the fees charged in all other United States District Courts. The Judicial Council of the District of Columbia Circuit and the Judicial Conference of the United States also support enactment of this legislation.

Prior to passage of the District of Columbia Court Reorganization Act of 1970, the U. S. District Court for the District of Columbia, in addition to its "federal" jurisdiction, also had jurisdiction over certain "local" criminal and civil cases. Because of this "local" jurisdiction, the United States Code and the District of Columbia Code, provided, in effect, that the fees to be charged to this U.S. District Court would be as set forth in the District of Columbia Code. The District of Columbia Court Reorganization Act of 1970 divested the U.S. District Court for the District of Columbia of all of its "local" jurisdiction. Through inadvertence, the statutorily prescribed fee structure was not changed.

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H.R. 2724 would simply bring to parity, with all other U.S. District Courts in the country, the fees to be charged for filing a civil case in the U.S. District Court for the District of Columbia. Our current fee for filing a civil case is \$10.00. Other U.S. District Courts have a filing fee of \$60.00. The fee for filing a civil case in the District of Columbia Superior Court is \$45.00 for a non-jury case and \$120.00 for a jury case.

Although H.R. 2724 would amend the United States Code, additional legislation will be needed to amend certain portions of Title 15 of the District of Columbia Code. Specifically, the following sections of Title 15, District of Columbia Code, would need to be amended:

- (a) Amend Subsection (a) of Section 15-701 by deleting "clerk of the United States District Court for the District of Columbia".
- (b) Amend Section 15-702 by deleting Subsections (a) and "(b)".
- (c) Amend Section 15-703 by deleting Subsections (a) and "(b)".
- (d) Amend Section 15-704 by deleting:
 - (i) "a";
 - (ii) "the United States District Court for the District of Columbia and"; and
 - (iii) subsection (b).
- (e) Repeal Section 15-706.
- (f) Amend Section 15-709 by deleting the second sentence of subsection (a).

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

APR 4 1985

SPOTTSWOOD W. ROBINSON, III
CHIEF JUDGE

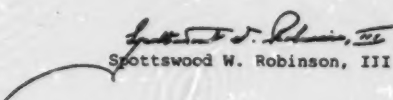
April 2, 1985

Honorable Robert W. Kastenmeier
Chairman
House Subcommittee on Courts
2328 Rayburn House Office Building
Washington, D. C. 20510

Dear Congressman Kastenmeier:

The Judicial Council for the District of Columbia Circuit strongly supports the enactment of legislation which would bring to parity, with all other federal district courts in the country, the fee to be charged for filing a case in the United States District Court for the District of Columbia. There is not evident to the Council any reason for continuance of the existent disparity, the elimination of which was inadvertently not included in the District of Columbia Reorganization Act of 1970.

Sincerely,


Spottswood W. Robinson, III

xc: Michael Remington, Esq.

APPENDIX VI

ADDITIONAL MATERIALS RELATING TO JUDICIAL REVIEW OF DECISIONS OF THE FEDERAL
MARITIME COMMISSION AND THE MARITIME ADMINISTRATION

MARITIME ADMINISTRATIVE BAR ASSOCIATION

JOHN B. ATTANASIO
PRESIDENT
SUITE 300
3033 K STREET, N.W.
WASHINGTON, D. C. 20008
(202) 452-0000

ANNE E. MICKET
VICE PRESIDENT
SUITE 300
ONE THOMAS CIRCLE, N.W.
WASHINGTON, D. C. 20005
(202) 722-7855

EDWARD J. SHEPPARD
SECRETARY-TREASURER
SUITE 300
1800 MASSACHUSETTS AVE., N.W.
WASHINGTON, D. C. 20036
(202) 828-1020

31 July 1985

The Honorable Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Civil Liberties,
and Administration of Justice
Committee on the Judiciary
United States House of Representatives
Rayburn House Office Building
Washington, D.C.

Re: H.R. 3049, Appellate Review of Orders of the Federal
Maritime Commission

Dear Mr. Chairman:

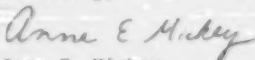
On behalf of the membership of the Maritime Administrative Bar Association, I hereby transmit a memorandum supporting H.R. 3049, a bill which would amend Title 28 of the United States Code to permit initial review of final orders of the Federal Maritime Commission by United States Circuit Courts of Appeals. As indicated by Federal Maritime Commission Chairman Alan Green in his letter to Chairman Rodino of April 10, 1985, the enactment of the Shipping Act of 1984 had the unintended effect of removing the Federal Maritime Commission from coverage of the Administrative Orders Review Act (28 U.S.C. § 2341 et seq.). The latter statute was enacted in 1950 and was designed to permit petitions for review of final orders of certain administrative agencies to be filed directly with U.S. Circuit Courts of Appeals. The Federal Maritime Commission was and continues to be one of the agencies whose orders are covered by the 1950 Act. Unfortunately, the sections of the United States Code cited in section 2342 have in large part been repealed by section 20 of the Shipping Act of 1954.

The membership of the Maritime Administrative Bar Association supports rectification of this situation. We find no evidence that the enactment of the Shipping Act of 1984 was in any way intended to modify the long-established appellate regime governing judicial review of orders of the Federal Maritime

Commission. Perhaps more importantly, the collective experience of the members of our association confirms the wisdom of Congress in placing review of FMC orders within the purview of the federal appellate courts. The role of the federal judiciary in reviewing orders of administrative agencies is an essentially appellate function. The procedures of the federal district court are not optimally designed to deal with appellate review of agency orders. Performance of appellate functions at the federal district court level places unwanted and unnecessary demands on the strained resources of those courts. Moreover, the FMC, the bar, and the public have been the beneficiaries of the juridical continuity which has been the result of appellate court review of agency orders. The addition of U.S. District Court involvement in this process serves no particular purpose and adds an unnecessary level of review and expense.

For these reasons, and as set forth in detail in the attached statement the Maritime Administrative Bar Association respectfully requests that your Committee give favorable consideration to the amendments of Title 28, United States Code, section 2342, which are currently contained in H.R. 3049.

Sincerely,



Anne E. Mickey
President
Maritime Administrative
Bar Association

cc: Robert D. Bourgojn, Esquire
(w. enclosure)

STATEMENT BY MARITIME ADMINISTRATIVE BAR ASSOCIATION
IN SUPPORT OF THOSE PORTIONS OF H.R. 3049 WHICH AMEND THE
ADMINISTRATIVE ORDERS REVIEW ACT

In 1950, the Congress of the United States established a system of review of final orders of certain federal administrative agencies whereby such orders were subject to review by the several circuit courts of appeals of the United States. The Administrative Orders Review Act of 1950 (hereinafter referred to as "the Hobbs Act" or "the Act") directs that final orders of the Federal Communications Commission, the Secretary of Agriculture, the Federal Maritime Commission, the Maritime Administration, the Nuclear Regulatory Commission, and the Interstate Commerce Commission be reviewed in the courts of appeals. The Act grants the court of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" such orders. 28 U.S.C. § 2342.

Prior to 1950, absent specific provisions in an administrative agency's statute, judicial review of agency orders was confined to federal district court review under the Urgent Deficiencies Act of 1913. 38 Stat. 219.¹ The procedures under that Act were cumbersome and complex. See discussion in Ayrshire

¹Many agencies operate under statutes which expressly create judicial review procedures. See, e.g., 15 U.S.C. § 45(c), Federal Trade Commission; 15 U.S.C. §§ 77i, 77vvv, 784(a), 79(x), Securities Exchange Commission. The Hobbs Act provided an external source of judicial review procedures for the agencies cited by that Act.

Collieries Corp. v. United States, 331 U.S. 132 (1947). The Hobbs Act was intended to replace the three-judge district court review under the Urgent Deficiencies Act with a more efficient procedure. Section 2342(3) of the Act establishes court of appeals review for final orders of the Federal Maritime Commission (FMC) and the Maritime Administration (MARAD). The Act describes its application to those two agencies as follows:

(3) such final orders of the Federal Maritime Commission or the Maritime Administration entered under chapters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46. . . .

Chapters 23 and 23A of title 46 refer to the Shipping Act, 1916 (46 U.S.C. § 801 et seq.) and the Intercoastal Shipping Act, 1933 (46 U.S.C. §§ 843-848). Section 830 of title 46 equates the venue and review procedures for orders of the FMC with those of the Interstate Commerce Commission.

In addition to providing a substantive continuity to judicial review of agency orders, the Hobbs Act establishes a procedural uniformity which has served the public well. Petitions for review must be filed within 60 days of the entry of an agency order. 28 U.S.C. § 2344. The Act establishes rights of intervention for interested parties and establishes procedures for obtaining stays of agency orders. 28 U.S.C. §§ 2348 and 2349. Supreme Court review of court of appeals orders and judgments pursuant to writ of certiorari is established by section 2350. In the context of orders of the Federal Maritime Commission, these provisions have operated felicitously in the

past in a manner familiar to and supported by the maritime legal community.

In 1984 Congress enacted substantially revised maritime regulatory legislation. This statute, entitled the Shipping Act of 1984, replaced many of the provisions of the Shipping Act, 1916. The enactment of the new shipping statute also caused a reassignment of U.S. Code designations governing the substantive authority of the Federal Maritime Commission. The unintended result of these events is that the U.S. Code references in section 2342(3) of the Administrative Orders Review Act no longer apply to the major part of the FMC's regulatory authority.

The Shipping Act of 1984 contains several provisions governing the FMC's access to courts of the United States. Section 6(h) and (i) establish that the United States District Court for the District of Columbia is the court of exclusive initial jurisdiction and venue to enjoin the operation of "substantially anticompetitive agreements." Section 6(k) states that the FMC may represent itself in district court proceedings undertaken pursuant to sections 6 and 11 of the Shipping Act. Recovery of civil penalties assessed pursuant to section 13 of the Shipping Act is to be undertaken by the Attorney General in an "appropriate district court of the United States." Sections 14(c) and (d) direct that enforcement of nonreparation and

reparation orders shall be obtained from the United States district court having jurisdiction over the parties.

Of the several provisions of the 1984 Shipping Act delineating the lines of judicial access available to the Commission and the regulated maritime community, only section 13(d) ("Review of Civil Penalties") establishes a continuing link with the Administrative Orders Review Act. That provision states that review of assessments of civil penalties will be within the jurisdiction of the federal courts of appeals pursuant to chapter 158 of title 28, United States Code. Challenges to the assessment of civil penalties have never been a significant part of FMC jurisprudence. The reference to these cases in section 13(d) does not provide for review by the courts of appeals for the types of issues which have been substantively and numerically important to the regulation of ocean transportation. These important issues involve the content of final orders of the Commission on issues of interpretation of the Shipping Act of 1984. It is these orders which should be subject to initial review by the United States Courts of Appeals.

Because the Shipping Act of 1984 is a novel and recent approach to regulation of the ocean shipping industry, it is important that decisions interpreting its scope and application be consistent in their procedural development and their substantive outcome. By amending title 28 of the United

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States Code to restore the authority of federal appellate courts to review orders of the Federal Maritime Commission, Congress can protect the orderly development of its maritime regulatory legislation. There has already been one instance in which a litigant has been unsuccessful in obtaining access to the United States Court of Appeals for the District of Columbia Circuit in seeking review of an FMC Order. The Maritime Administrative Bar Association therefore supports amendment of the Hobbs Act as proposed by H.R. 3049. Such an amendment would reassert the jurisdiction of the courts of appeals over final orders of the FMC. The an amendment would not affect those provisions of the Shipping Act of 1984 which create specific federal district court procedures for obtaining injunctive relief or enforcing rights pursuant to FMC orders.



American
Institute for
Shippers' Assns.
Inc.

Madison National Bank Bldg
PO Box 33457
Washington, D.C. 20033
202/638-0633

Dedicated to Cooperative Shipping

September 13, 1985

HAND DELIVERED

The Honorable Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: H.R. 3049

Dear Chairman Kastenmeier:

This letter is written on behalf of the American Institute for Shippers' Associations, Inc. (AISA), in support of the above-referenced legislation. AISA and its underlying membership of shippers' associations has a vital interest in H.R. 3049 because the proposed legislation would potentially affect litigation that AISA is currently involved in before the federal courts in the District of Columbia. AISA's experience as one of the first litigants under the Shipping Act of 1984 provides a practical example of the actual detrimental effect of the jurisdictional uncertainties faced on appeals of final orders entered under the Shipping Act of 1984 and that H.R. 3049 would rectify. However, because H.R. 3049 is unclear in whether it would affect this and similar litigation AISA respectfully requests that the bill be modified to ensure that it applies to all appeals of final orders of the Federal Maritime Commission, including those issued prior to the effective date of the proposed legislation.

AISA is a national trade association representing shippers' associations. Shippers' associations have been recognized by federal statute since 1942, when they were defined in the

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Interstate Commerce Act, 49 U.S.C. § 10562(3). In 1984, Congress chose to recognize the status of shippers' associations operating in the international maritime trades when it included a definition for them in the Shipping Act of 1984, 46 U.S.C. § 1702(24). Subsequent to the passage of the Shipping Act of 1984, AISA asked the Federal Maritime Commission to clarify the status of shippers' associations operating pursuant to the Shipping Act of 1984 and the ability of various transportation entities to participate in shippers' associations. The FMC has denied AISA's petition and AISA is accordingly seeking judicial review of that order.

On May 17, 1985, we wrote to you concerning this appeal. AISA had filed its appeal in both the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia. These concurrent filings were necessitated by the fact that no clear-cut exclusive jurisdictional authorization exists in the United States Court of Appeals to review final orders of the FMC entered under the Shipping Act of 1984, 46 U.S.C. § 1701, et seq. The purpose of our May 17, 1985, letter was to support requests made to both members of the House and Senate by representatives of the maritime industry requesting remedial legislation to rectify this problem. Furthermore, we requested that any legislation adopted by the Congress include a provision, such as that proposed by the Maritime Bar Association, which would ensure Court of Appeals jurisdiction over the appeal of any final order of the Federal Maritime Commission entered after the June 18, 1984, effective date of the Shipping Act of 1984.

Since our previous letter, the Senate has passed S. 679 and you have introduced H.R. 3049. AISA fully supports these efforts to clarify the questions concerning Court of Appeals jurisdiction over review of FMC final orders. However, there are certain aspects of AISA's appeal, and H.R. 3049, that AISA would like to bring to the Committee's attention.

As noted in our previous letter to you, Judge Green of the United States District Court for the District of Columbia dismissed AISA's district court case without prejudice on April 30, 1985. On July 24, 1985, the United States Court of Appeals for the District of Columbia Circuit granted the Federal Maritime Commission's motion to dismiss AISA's appellate court petition for lack of jurisdiction. Unless an AISA petition for a rehearing of the appellate court's order is granted, AISA will be compelled to refile its lawsuit in the United States District Court for the District of Columbia.

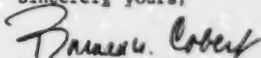
Given this set of circumstances, AISA is concerned that cases such as its could "fall through the cracks" as H.R. 3049 is currently worded. Basically, we read H.R. 3049 as merely incorporating the Shipping Act of 1984 into the current provisions of the Administrative Orders Review Act of 1950. That act confers exclusive jurisdiction in the court of appeals for appeals of designated agency final orders brought within sixty days of the agency's entering such an order. H.R. 3049 would not, however, indicate whether appeals currently pending before the courts of appeals, pending before the district courts, or brought under the amended statute when the sixty day period had expired prior to enactment of the statute would be within the exclusive jurisdiction of the courts of appeals. It is AISA's position that any technical legislation enacted by Congress should contain clear and specific language conferring exclusive jurisdiction in the United States Court of Appeals for all final orders entered under the Shipping Act of 1984, including orders, such as that appealed by AISA, entered within the sixty day period prior to the effective date of the remedial legislation.

Accordingly, AISA believes that H.R. 3049 should be modified to clearly indicate that exclusive jurisdiction over appeals such as AISA's is in the Court of Appeals in order to ensure that all appeals of FMC decisions under the Shipping Act of 1984 are uniformly treated.

^{1/} For example, the Federal Maritime Commission published final regulations governing the co-loading practices of nonvessel operating common carriers on August 6, 1985. Under a sixty day appeal rule, an appeal of this order would have to be taken by October 5, 1985. As AISA currently reads the law, an appeal in the district court in the absence of the applicability of the Administrative Orders Review Act would be permitted within six years. Accordingly, a litigant contemplating an appeal of those regulations under the current jurisdictional scheme could plan to file its appeal in district court after October 5th, but have that appeal dismissed due to improper jurisdiction if intervening legislation amended Title 28. A subsequent appeal to the court of appeals could also be treated as untimely under the intervening legislation. A specific example would be if an appeal of the coloaded regulations was planned to be filed in district court on October 10th, but H.R. 3049 was also effective on October 10th. Arguably, an appeal at either the district or appellate court level would be barred.

AISA offers its comments on H.R. 3049 to provide the Congress with a concrete example of the problem that the bill attempts to address. For the Shipping Act of 1984 to work properly, this legislation is needed now. Otherwise, future litigants adversely affected by decisions of the Federal Maritime Commission may observe AISA's problems and be deterred from seeking their due process in the courts. AISA therefore urges the Committee to report the bill, with the changes advocated by AISA.

Sincerely yours,



Ronald N. Cobert
General Counsel
American Institute for Shippers'
Associations, Inc.

APPENDIX VII

ADDITIONAL MATERIALS RELATING TO ACTUAL TRAVEL EXPENSES

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
U. S. COURTHOUSE, ROOM 1817
BOSTON, MASSACHUSETTS 02108

STEPHEN GREYER
CIRCUIT JUDGE

617-323-6670

September 29, 1982

Congressman Robert W. Kastenmeier
Room 2232
Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Kastenmeier:

Mike Remington has just told me of your help in enacting a provision allowing certain judges (like elected officials) to receive their actual out-of-pocket expenses when they work away from home--for more than 30 days. I am delighted. The previous situation, where judges often had to pay part of their own work expenses, was unfair, undignified, inefficient (discouraging judges from going where needed) and undemocratic (reinforcing the tendency to limit the judiciary to those of independent means). You have helped achieve one of the minor reforms that, as a practical matter, will help the judicial system function more effectively. So, thank you. If more of the judges knew of your role (a situation I am trying to remedy) I suspect you would receive more notes.

I have one bit of special pleading. Because of the "30-day" limitation, the new rule does not help appellate courts. In the First Circuit, we must "borrow" two senior judges each month, for our caseload is 1,200 appeals (300 per active judge) per year. The borrowed judges sit, however, for one week, not for one month. Because they must stay in a hotel, their expenses are at least as great as those of district court judges sitting for 30 days. Aside from

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the "fairness" question, we face the practical problem of convincing judges from other circuits to sit here. The fact that they must pay a portion of their expenses themselves makes this more difficult.

In any event, I continue to follow your work on the judiciary committee with interest and appreciation.

I send my best wishes,

Yours sincerely,

Stephen Breyer

bcc: Hon. Frank M. Coffin
Mike Remington

SEP 24 1985

UNITED STATES TAX COURT

WASHINGTON, D. C. 20217

CHAMBERS OF
SAMUEL B. STERRETT
CHIEF JUDGE

September 23, 1985

The Honorable Robert W. Kastenmeier
U.S. House of Representatives
Chairman, Subcommittee on
Courts, Civil Liberties, and
the Administration of Justice
House Judiciary Committee
2328 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Kastenmeier,

On behalf of the presidentially appointed Judges of the United States Tax Court, I am taking the liberty to submit the Court's views on H.R. 2561, a bill introduced by you and Congressman Moorhead, and now pending before the House Judiciary Committee, Subcommittee on Courts, Civil Liberties and the Administration of Justice. H.R. 2561, as you know, would amend section 456(a) of Title 28, United States Code, to permit United States judges attending court or transacting official business to receive "all necessary transportation expenses and actual and necessary expenses of subsistence actually incurred" in accordance with regulations prescribed by the Director of the Administrative Office of the U.S. Courts. Let me express our appreciation for your willingness to co-sponsor a bill which would correct the grievous inequity of the present situation.

Although the U.S. Tax Court is a court of record under Article I of the Constitution (26 U.S.C. § 7441), and not a "United States court" as defined in Title 28, judges of the Tax Court receive travel and subsistence expenses in the same manner as judges of the U.S. Court of International Trade, who are subject to 28 U.S.C. § 456. (See 26 U.S.C. § 7443(d).)

The Tax Court is a trial court, headquartered in Washington, D.C., and required to hold court throughout the country. In fact, we hold court in over 80 cities. The 19 presidentially appointed judges of the Court travel on an average of 20 weeks each year, hearing arguments in some of the 70,000 cases now pending before the Court. As you know, under current law, judges are limited to a subsistence allowance of \$75 per day which is an entirely inadequate amount, particularly in major cities such as New York or Chicago. The Court estimates that forty percent of the regular cases before the Court are concentrated in three cities -- New York, Los Angeles and San Francisco. As a result, a Tax Court judge is in each of these cities approximately twenty weeks out of the year.

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The daily subsistence of \$75 does not even approach a sufficient level; judges of the Court are losing money because they are not fully reimbursed for their lodging and meals. In the February 1985 issue of Corporate Travel, a business travel management publication, it was reported that lodging in New York averaged \$89.09 each day while food was \$87.77 per day for a daily total of \$176.86. In Los Angeles, lodging averaged \$72.62 per day, and food \$55.72, for a total of \$128.34. In the San Francisco/Oakland area, the daily lodging expense was \$63.99, while food was \$63.29, thus totalling \$127.28 each day. The amount of each judge's annual loss is substantial and continues to grow each year.

Currently, a judge's annual salary is \$78,700, an amount clearly inadequate to permit him to pay unreimbursed business expenses from his own pocket without considerable personal sacrifice. Considering the many financial sacrifices made by those who serve on the bench, we believe that H.R. 2561 will correct a glaring inequity by providing a fair, equitable mechanism by which judges will be reimbursed for expenses incurred by them in the performance of their official duties.

We strongly support the changes proposed by H.R. 2561 and we are most grateful to you for your efforts in introducing the legislation. Please let me know if we can be of any further assistance to you.

With every good wish
Sincerely yours,

Samuel B. Sterrett

Samuel B. Sterrett
Chief Judge

APPENDIX VIII

LEGISLATIVE MATERIALS RELATING TO H.R. 3570

99TH CONGRESS
1ST SESSION**H. R. 3570**

[Report No. 99-423, Part I]

To amend title 28, United States Code, to reform and improve the Federal justices and judges survivors' annuities program, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 16, 1985

Mr. KASTENMEIER (for himself, Mr. MOORHEAD, Mr. MAESOLI, Mr. SYNAR, Mrs. SCHROEDER, Mr. FRANK, Mr. MORRISON of Connecticut, Mr. BERMAN, Mr. BOUCHER, Mr. HYDE, Mr. KINDNESS, Mr. DEWINE, Mr. SWINDALL, Mr. SHAW, and Mr. GREEN) introduced the following bill; which was referred to the Committee on the Judiciary

DECEMBER 6, 1985

Additional sponsors: Mr. SUNDQUIST, Mr. QUILLEN, Mr. BROOKS, Mrs. LLOYD, Mr. BARNARD, Mr. PERKINS, Mr. RAY, Mr. ANDREWS, Mr. GORDON, Mr. LATTA, and Mr. HUTTO

DECEMBER 6, 1985

Reported with an amendment and referred to the Committee on Appropriations for a period ending not to exceed fifteen legislative days with instructions to report back to the House as provided in section 401(b) of Public Law 93-344

[Strike out all after the enacting clause and insert the part printed in *italic*]

[For text of introduced bill, see copy of bill as introduced on October 16, 1985]

A BILL

To amend title 28, United States Code, to reform and improve the Federal justices and judges survivors' annuities program, and for other purposes.

2

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 **SECTION 1. SHORT TITLE.**

4 *This Act may be cited as the "Judicial Improvements*
5 *Act of 1985".*

6 **SEC. 2. JUDICIAL SURVIVORS' ANNUITIES AMENDMENTS.**

7 (a) **BENEFIT REFORMS.**—Section 376 of title 28,
8 *United States Code, is amended as follows:*

9 (1) Subsection (a)(1) is amended by striking out
10 "or (iii) the date upon which the Judicial Survivors'
11 Annuities Reform Act becomes effective," and inserting
12 in lieu thereof "(iii) January 1, 1977; or (iv)
13 January 1, 1986;"

14 (2) Subsections (b) and (d) are each amended by
15 striking out "4.5 percent" each place it appears and
16 inserting in lieu thereof "5 percent".

17 (3) Subsection (c) is amended to read as follows:

18 "(c)(1) There shall also be deposited to the credit of the
19 Judicial Survivors' Annuities Fund, in accordance with
20 such procedures as the Comptroller General of the United
21 States may prescribe, amounts required to reduce to zero the
22 unfunded liability of the Judicial Survivors' Annuities
23 Fund. Such deposits shall be taken from the fund used to pay
24 the compensation of the judicial official, and shall immedi-

1 ately become an integrated part of the Judicial Survivors'
2 Annuities Fund for any use required under this section.

3 “(2) For purposes of paragraph (1), the term ‘unfunded
4 liability’ means the estimated excess, determined by the
5 Comptroller General on an annual basis, of the present value
6 of all benefits payable from the Judicial Survivors’ Annuities
7 Fund, over the sum of—

8 “(A) the present value of deductions to be with-
9 held from the future basic pay of judicial officials; plus

10 “(B) the balance in the Fund as of the date the
11 unfunded liability is determined.

12 In making any determination under this paragraph, the
13 Comptroller General shall use the applicable information
14 contained in the reports filed pursuant to section 9503 of title
15 31, United States Code, with respect to the judicial survi-
16 vors’ annuities plan established by this section.”.

17 (3) Subsection (h) is amended—

18 (A) in paragraph (1)(B), by striking out
19 clauses (i) and (ii) and inserting in lieu thereof
20 the following:

21 “(i) 10 percent of the average annual
22 salary determined under subsection (1)(1) of
23 this section; or

24 “(ii) 20 percent of such average annual
25 salary, divided by the number of children.”;

4

1 (B) in paragraph (1)(C) by striking out
2 clauses (ii) and (iii) and inserting in lieu thereof
3 the following:

4 "(ii) 20 percent of the average annual
5 salary determined under subsection (1)(1) of
6 this section; or

7 "(iii) 40 percent of such average annual
8 salary amount, divided by the number of
9 children;"; and

10 (C) in paragraph (2) by inserting immedi-
11 ately after "remarriage" the following: "before at-
12 taining age 55".

13 (4) Subsection (1) is amended—

14 (A) by striking out "1¼ percent" and insert-
15 ing in lieu thereof "1.5 percent";

16 (B) in paragraph (2) by striking out the
17 colon after "subsection" and inserting in lieu
18 thereof a semicolon; and

19 (C) by striking out the proviso and inserting
20 in lieu thereof the following: "except that such an-
21 nuity shall not exceed an amount equal to 55 per-
22 cent of such average annual salary, nor be less
23 than an amount equal to 30 percent of such aver-
24 age annual salary. Any annuity determined in
25 accordance with the provisions of this subsection

1 shall be reduced to the extent required by subsec-
2 tion (d) of this section."

3 (5) Subsection (a) is amended—

4 (A) in paragraph (1)(C) by inserting "or
5 Deputy Director" immediately after "Director";
6 and

7 (B) in paragraph (2)(C) by inserting "or
8 Deputy Director" immediately after "Director".

9 (b) *BENEFICIARIES.*—The benefits conferred by section
10 376 of title 28, United States Code, by reason of the amend-
11 ments made by this section shall apply only to individuals
12 who become eligible for annuities under such section on or
13 after the effective date of this section, except that—

14 (1) such annuities shall be computed in accord-
15 ance with the provisions of section 376 of title 28,
16 United States Code, as amended by this section, not-
17 withstanding contributions or deposits made in accord-
18 ance with applicable law at lower rates; and

19 (2) no additional liability shall be created with re-
20 spect to deposits made in accordance with applicable
21 law before the effective date of this section, or after
22 such effective date pursuant to an agreement entered
23 into before such effective date.

24 (c) *REVOCATION.*—(1) Within 180 days after the effec-
25 tive date of this section, any judicial official who, before such

1 *effective date, made an election under section 376 of title 28,*
2 *United States Code, to come within the purview of that sec-*
3 *tion, shall be entitled to revoke that election. Such revocation*
4 *shall constitute a complete withdrawal from the judicial sur-*
5 *vivors' annuities program provided for in such section 376.*
6 *No such revocation shall be effective unless it is submitted in*
7 *writing to the Director of the Administrative Office of the*
8 *United States Courts, and until such writing is received by*
9 *the Director. Upon receipt by the Director of such writing,*
10 *any rights to survivorship benefits for the survivors of such*
11 *judicial official shall terminate, and all amounts credited to*
12 *the individual account of such judicial official under section*
13 *376(e), together with interest at 3 percent per annum, com-*
14 *pounded on December 31 of each year to such date of revoca-*
15 *tion, shall be returned to that judicial official in a lump-sum*
16 *payment.*

17 (2) *Any judicial official who makes a revocation under*
18 *paragraph (1) of this subsection and who thereafter becomes*
19 *eligible to make an election under section 376(b) of title 28,*
20 *United States Code, may make such election only if such*
21 *judicial official redeposits, to the credit of the Judicial Survi-*
22 *vors' Annuities Fund, the full amount of the lump-sum pay-*
23 *ment made to such judicial official under paragraph (1) of*
24 *this subsection, together with interest at 3 percent per annum,*
25 *compounded on December 31 of each year from the date of*

1 such revocation until the date upon which that amount is so
2 redeposited.

3 (3) Any judicial official who fails to revoke an election
4 in accordance with paragraph (1) of this subsection shall be
5 deemed to have irrevocably waived the right to make that
6 revocation.

7 (d) ANNUITIES FOR FORMER SPOUSES.—

8 (1) Section 376 of title 28, United States Code,
9 is amended in subsection (a)—

10 (A) by striking out the period at the end of
11 paragraph (5) and inserting in lieu thereof “;
12 and”; and

13 (B) by adding at the end the following new
14 paragraph:

15 “(6) ‘former spouse’ means a former spouse of a
16 judicial official if the former spouse was married to
17 such judicial official for at least 9 months.”

18 (2) Section 376 of title 28, United States Code,
19 is amended by adding at the end the following new
20 subsections:

21 “(a) A judicial official who has a former spouse may
22 elect, under procedures prescribed by the Director of the Ad-
23 ministrative Office of the United States Courts, to provide a
24 survivor annuity for such former spouse under subsection (1).
25 An election under this subsection shall be made at the time of

1 retirement, or, if later, within 2 years after the date on which
2 the marriage of the former spouse to the judicial official is
3 dissolved. An election under this subsection—

4 “(1) shall not be effective to the extent that it—

5 “(A) conflicts with—

6 “(i) any court order or decree referred
7 to in subsection (1)(1), which was issued
8 before the date of such election, or

9 “(ii) any agreement referred to in such
10 subsection which was entered into before
11 such date; or

12 “(B) would cause the total of survivor annu-
13 ities payable under subsections (h) and (i) based
14 on the service of the judicial official to exceed 55
15 percent of the average annual salary (as such
16 term is used in subsection (1)) of such official;
17 and

18 “(2) shall not be effective, in the case of a judicial
19 official who is then married, unless it is made with the
20 spouse's written consent.

21 The Director of the Administrative Office of the United
22 States Courts shall provide by regulation that paragraph (2)
23 of this subsection may be waived if the judicial official estab-
24 lishes to the satisfaction of the Director that the spouse's
25 whereabouts cannot be determined, or that, due to exceptional

1 circumstances, requiring the judicial official to seek the
2 spouse's consent would otherwise be inappropriate.

3 “(1)(1) Subject to paragraphs (2) through (4) of this
4 subsection, a former spouse of a deceased judicial official is
5 entitled to a survivor annuity under this section if and to the
6 extent expressly provided for in an election under subsection
7 (a), or in the terms of any decree of divorce or annulment or
8 any court order or court-approved property settlement agree-
9 ment incident to such decree.

10 “(2) The annuity payable to a former spouse under this
11 subsection may not exceed the difference between—

12 “(A) the maximum amount that would be payable
13 as an annuity to a widow or widower under subsection
14 (1), determined without taking into account any reduc-
15 tion of such annuity caused by payment of an annuity
16 to a former spouse; and

17 “(B) the amount of any annuity payable under
18 this subsection to any other former spouse of the judi-
19 cial official, based on an election previously made
20 under subsection (a), or a court order previously
21 issued.

22 “(3) The commencement and termination of an annuity
23 payable under this subsection shall be governed by the terms
24 of the applicable order, decree, agreement, or election, as the
25 case may be, except that any such annuity—

1 “(A) shall not commence before—

2 “(i) the day after the judicial official dies, or

3 “(ii) the first day of the second month begin-
4 ning after the date on which the Director of the
5 Administrative Office of the United States Courts
6 receives written notice of the order, decree, agree-
7 ment, or election, as the case may be, together
8 with such additional information or documenta-
9 tion as the Director may prescribe,

10 whichever is later, and

11 “(B) shall terminate no later than the last day of
12 the month before the former spouse remarries before be-
13 coming 55 years of age or dies.

14 “(4) For purposes of this section, a modification in a
15 decree, order, agreement, or election referred to in paragraph
16 (1) of this subsection shall not be effective—

17 “(A) if such modification is made after the retire-
18 ment of the judicial official concerned, and

19 “(B) to the extent that such modification involves
20 an annuity under this subsection.”.

21 (3)(A) Subsection (1) of section 376 of title 28,
22 United States Code, (as amended by subsection
23 (a)(4)(C) of this section) is amended by striking out
24 the period at the end of the last sentence and by adding
25 at the end the following: “; and by the amount of any

1 *annuity payable to a former spouse under subsection*
2 *(i)."*

3 *(B) Subsection (n) of section 376 of such title is*
4 *amended in the last sentence by inserting after*
5 *"equity," the following: "except as provided in subsec-*
6 *tions (s) and (i)."*

7 *(C) Subsection (o) of section 376 of such title is*
8 *amended in paragraphs (2) and (3) by inserting "or*
9 *(i)" after "subsection (h)" each place it appears.*

10 *(4) Payments of retirement salary as defined in*
11 *section 376(a)(2) of title 28, United States Code,*
12 *which would otherwise be made to the judicial official*
13 *upon whose service the retirement salary is based, shall*
14 *be paid (in whole or in part) to another person if and*
15 *to the extent expressly provided for in the terms of any*
16 *court decree of divorce, annulment, or legal separation,*
17 *or the terms of any court order or court-approved prop-*
18 *erty settlement agreement incident to any court decree*
19 *of divorce, annulment, or legal separation. Any pay-*
20 *ment under this paragraph to a person bars recovery*
21 *by any other person. This paragraph shall apply only*
22 *to payments made after the date of receipt by the Di-*
23 *rector of the Administrative Office of United States*
24 *Courts of written notice of such decree, order, or agree-*
25 *ment, and such additional information and documenta-*

1 tion as the Director may prescribe. As used in this
2 paragraph, "court" means any court of any State or
3 the District of Columbia.

4 (e) *EFFECTIVE DATE.*—This section shall take effect
5 on October 1, 1986.

6 **SEC. 1. REMOVAL JURISDICTION.**

7 (a) *SECTION 1441 AMENDMENT.*—Section 1441 of
8 title 28, United States Code, is amended by adding at the
9 end the following new subsection:

10 “(e) The court to which such civil action is removed is
11 not precluded from hearing and determining any claim in
12 such civil action because the State court from which such
13 civil action is removed did not have jurisdiction over that
14 claim.”.

15 (b) *EFFECTIVE DATE.*—The amendment made by this
16 section shall apply with respect to claims in civil actions
17 commenced in State courts on or after the date of the enact-
18 ment of this section.

19 **SEC. 4. TRAVEL EXPENSES OF JUSTICES AND JUDGES.**

20 (a) *SECTION 456 AMENDMENT.*—Section 456(a) of
21 title 28, United States Code, is amended by striking out “for
22 any continuous period” and all that follows through the end
23 of the subsection and inserting in lieu thereof the following:
24 “(1) all necessary transportation expenses; and (2) a per
25 diem allowance for travel at the rate which the Director es-

1 tablishes not to exceed the maximum per diem allowance
2 fixed by section 5702(a) of title 5, or actual and necessary
3 expenses of subsistence actually incurred, notwithstanding
4 the provisions of section 5702 of title 5, United States Code,
5 in accordance with regulations which the Director shall pre-
6 scribe with the approval of the Judicial Conference of the
7 United States. In determining necessary expenses, the Direc-
8 tor shall take into account the reasonable costs of transporta-
9 tion and subsistence generally incurred for travel to the geo-
10 graphic area involved."

11 (b) *EFFECTIVE DATE.*—The amendment made by this
12 section shall take effect on October 1, 1986.

13 **SEC. 5. COLLECTION OF FEES FOR THE UNITED STATES DIS-**
14 **TRICT COURT FOR THE DISTRICT OF COLUMBIA.**

15 (a) *SECTION 1914 AMENDMENT.*—Section 1914 of
16 title 28, United States Code, relating to district court fees, is
17 amended by striking out subsection (d).

18 (b) *EFFECTIVE DATE.*—The amendment made by this
19 section shall apply with respect to any civil action, suit, or
20 proceeding instituted on or after the date of the enactment of
21 this Act.

22 **SEC. 6. JUDICIAL REVIEW OF FEDERAL MARITIME COMMISSION**
23 **AND MARITIME ADMINISTRATION ORDERS.**

24 (a) *SECTION 2342 AMENDMENT.*—Section 2342(3) of
25 title 28, United States Code, is amended to read as follows:

1 “(3) all rules, regulations, or final orders of—

2 “(A) the Secretary of Transportation issued
3 pursuant to section 2, 9, 37, 41 or 43 of the
4 Shipping Act, 1916 (46 U.S.C. App. 839); and

5 “(B) the Federal Maritime Commission
6 issued pursuant to—

7 “(i) section 23, 25, or 43 of the Ship-
8 ping Act, 1916 (46 U.S.C. App. 822, 824,
9 or 841a);

10 “(ii) section 19 of the Merchant Marine
11 Act, 1920 (46 U.S.C. App. 876);

12 “(iii) section 2, 3, 4, or 5 of the Inter-
13 coastal Shipping Act, 1933 (46 U.S.C. App.
14 844, 845, 845a, or 845b);

15 “(iv) section 14 or 17 of the Shipping
16 Act of 1984 (46 U.S.C. App. 1713 or
17 1716); or

18 “(v) section 2(d) or 3(d) of the Act of
19 November 6, 1966 (46 U.S.C. App. 817d(d)
20 or 817e(d)).”

21 (b) *EFFECTIVE DATE.*—The amendment made by this
22 section shall apply with respect to any rule, regulation, or
23 final order described in such amendment which is issued on
24 or after the date of the enactment of this Act.

1 **S.L.C. 7. TECHNICAL AMENDMENTS.**

2 (a) **REDESIGNATION OF DUPLICATE SECTIONS.—**

3 (1) **TITLE 28 AMENDMENTS.—**Chapter 85 of
4 title 28, United States Code, is amended—

5 (A) in the table of sections by striking out

"1364. Senate Actions.

"1364. Construction of references to laws of the United States or Acts of Congress."

6 and inserting in lieu thereof the following:

"1365. Senate Actions.

"1366. Construction of references to laws of the United States or Acts of Congress.";

7 (B) by striking out the section heading

8 "**§ 1364. Senate actions**"

9 and inserting in lieu thereof the following:

10 "**§ 1365. Senate actions**"; and

11 (C) by striking out the section heading

12 "**§ 1364. Construction of references to laws of the United**
13 **States or Acts of Congress**"

14 and inserting in lieu thereof the following:

15 "**§ 1366. Construction of references to laws of the United**
16 **States or Acts of Congress**".

17 (2) **CONFORMING AMENDMENT.—**Section 705(a)
18 of the Ethics in Government Act of 1978 (P.L. 95-
19 521; 2 U.S.C. 288d(a)) is amended by striking out
20 "1364" and substituting "1365".

21 (b) **DELETION OF INCORRECT REFERENCES.—**Para-
22 graph (3) of section 620(b) of title 28, United States Code, is
23 amended—

1 (1) by striking out "referees,"; and

2 (2) by substituting "magistrates" for "commis-
3 sioners".

4 (c) *EFFECTIVE DATE.*—*The amendments made by this*
5 *section shall take effect on the date of the enactment of this*
6 *Act.*

JUDICIAL IMPROVEMENTS ACT OF 1985

DECEMBER 6, 1985.—Ordered to be printed

Mr. KASTENMEIER, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany H.R. 3570]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3570) to amend title 28, United States Code, to reform and improve the Federal justices and judges survivors' annuities program, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Judicial Improvements Act of 1985".

SEC. 2. JUDICIAL SURVIVORS' ANNUITIES AMENDMENTS.

(a) BENEFIT REFORMS.—Section 376 of title 28, United States Code, is amended as follows:

(1) Subsection (a)(1) is amended by striking out "or (iii) the date upon which the Judicial Survivors' Annuities Reform Act becomes effective;" and inserting in lieu thereof "(iii) January 1, 1977; or (iv) January 1, 1986;"

(2) Subsections (b) and (d) are each amended by striking out "4.5 percent" each place it appears and inserting in lieu thereof "5 percent".

(3) Subsection (c) is amended to read as follows:

"(c)(1) There shall also be deposited to the credit of the Judicial Survivors' Annuities Fund, in accordance with such procedures as the Comptroller General of the United States may prescribe, amounts required to reduce to zero the unfunded liability of the Judicial Survivors' Annuities Fund. Such deposits shall be taken from the fund used to pay the compensation of the judicial official, and shall immediately become an integrated part of the Judicial Survivors' Annuities Fund for any use required under this section.

"(2) For purposes of paragraph (1) the term 'unfunded liability' means the estimated excess, determined by the Comptroller General on an annual basis, of the present value of all benefits payable from the Judicial Survivors' Annuities Fund, over the sum of—

"(A) the present value of deductions to be withheld from the future basic pay of judicial officials; plus

"(B) the balance in the Fund as of the date the unfunded liability is determined.

In making any determination under this paragraph, the Comptroller General shall use the applicable information contained in the reports filed pursuant to section 9503 of title 31, United States Code, with respect to the judicial survivors' annuities plan established by this section."

(3) Subsection (h) is amended—

(A) in paragraph (1)(B), by striking out clauses (i) and (ii) and inserting in lieu thereof the following:

"(i) 10 percent of the average annual salary determined under subsection (1)(1) of this section; or

"(ii) 20 percent of such average annual salary, divided by the number of children;"

(B) in paragraph (1)(C) by striking out clauses (ii) and (iii) and inserting in lieu thereof the following:

"(ii) 20 percent of the average annual salary determined under subsection (1)(1) of this section; or

"(iii) 40 percent of such average annual salary amount, divided by the number of children;" and

(C) in paragraph (2) by inserting immediately after "remarriage" the following: "before attaining age 55".

(4) Subsection (1) is amended—

(A) by striking out "1 1/4 percent" and inserting in lieu thereof "1.5 percent";

(B) in paragraph (2) by striking out the colon after "subsection" and inserting in lieu thereof a semicolon; and

(C) by striking out the proviso and inserting in lieu thereof the following: "except that such annuity shall not exceed an amount equal to 55 percent of such average annual salary, nor be less than an amount equal to 30 percent of such average annual salary. Any annuity determined in accordance with the provisions of this subsection shall be reduced to the extent required by subsection (d) of this section."

(5) Subsection (a) is amended—

(A) in paragraph (1)(C) by inserting "or Deputy Director" immediately after "Director"; and

(B) in paragraph (2)(C) by inserting "or Deputy Director" immediately after "Director".

(b) **BENEFICIARIES.**—The benefits conferred by section 376 of title 28, United States Code, by reason of the amendments made by this section shall apply only to individuals who become eligible for annuities under such section on or after the effective date of this section, except that—

(1) such annuities shall be computed in accordance with the provisions of section 376 of title 28, United States Code, as amended by this section, notwithstanding contributions or deposits made in accordance with applicable law at lower rates; and

(2) no additional liability shall be created with respect to deposits made in accordance with applicable law before the effective date of this section, or after such effective date pursuant to an agreement entered into before such effective date.

(c) **REVOCATION.**—(1) Within 180 days after the effective date of this section, any judicial official who, before such effective date, made an election under section 376 of title 28, United States Code, to come within the purview of that section, shall be entitled to revoke that election. Such revocation shall constitute a complete withdrawal from the judicial survivors' annuities program provided for in such section 376. No such revocation shall be effective unless it is submitted in writing to the Director of the Administrative Office of the United States Courts, and until such writing is received by the Director. Upon receipt by the Director of such writing, any rights to survivorship benefits for the survivors of such judicial official shall terminate, and all amounts credited to the individual account of such judicial official under section 376(e), together with interest at 3 percent per annum, compounded on December 31 of each year to such date of revocation, shall be returned to that judicial official in a lump-sum payment.

(2) Any judicial official who makes a revocation under paragraph (1) of this subsection and who thereafter becomes eligible to make an election under section 376(b) of title 28, United States Code, may make such election only if such judicial official

redeposits, to the credit of the Judicial Survivors' Annuities Fund, the full amount of the lump-sum payment made to such judicial official under paragraph (1) of this subsection, together with interest at 3 percent per annum, compounded on December 31 of each year from the date of such revocation until the date upon which that amount is so redeposited.

(3) Any judicial official who fails to revoke an election in accordance with paragraph (1) of this subsection shall be deemed to have irrevocably waived the right to make that revocation.

(d) ANNUITIES FOR FORMER SPOUSES.—

(1) Section 376 of title 28, United States Code, is amended in subsection (a)—

(A) by striking out the period at the end of paragraph (5) and inserting in lieu thereof “; and”; and

(B) by adding at the end the following new paragraph:

“(6) ‘former spouse’ means a former spouse of a judicial official if the former spouse was married to such judicial official for at least 9 months.”

(2) Section 376 of title 28, United States Code, is amended by adding at the end the following new subsections:

“(s) A judicial official who has a former spouse may elect, under procedures prescribed by the Director of the Administrative Office of the United States Courts, to provide a survivor annuity for such former spouse under subsection (t). An election under this subsection shall be made at the time of retirement, or, if later, within 2 years after the date on which the marriage of the former spouse to the judicial official is dissolved. An election under this subsection—

“(1) shall not be effective to the extent that it—

“(A) conflicts with—

“(i) any court order or decree referred to in subsection (t)(1), which was issued before the date of such election, or

“(ii) any agreement referred to in such subsection which was entered into before such date; or

“(B) would cause the total of survivor annuities payable under subsections (h) and (t) based on the service of the judicial official to exceed 55 percent of the average annual salary (as such term is used in subsection (l)) of such official; and

“(2) shall not be effective, in the case of a judicial official who is then married, unless it is made with the spouse's written consent.

The Director of the Administrative Office of the United States Courts shall provide by regulation that paragraph (2) of this subsection may be waived if the judicial official establishes to the satisfaction of the Director that the spouse's whereabouts cannot be determined, or that, due to exceptional circumstances, requiring the judicial official to seek the spouse's consent would otherwise be inappropriate.

“(t)(1) Subject to paragraphs (2) through (4) of this subsection, a former spouse of a deceased judicial official is entitled to a survivor annuity under this section if and to the extent expressly provided for in an election under subsection (s), or in the terms of any decree of divorce or annulment or any court order or court-approved property settlement agreement incident to such decree.

“(2) The annuity payable to a former spouse under this subsection may not exceed the difference between—

“(A) the maximum amount that would be payable as an annuity to a widow or widower under subsection (l), determined without taking into account any reduction of such annuity caused by payment of an annuity to a former spouse; and

“(B) the amount of any annuity payable under this subsection to any other former spouse of the judicial official, based on an election previously made under subsection (s), or a court order previously issued.

“(3) The commencement and termination of an annuity payable under this subsection shall be governed by the terms of the applicable order, decree, agreement, or election, as the case may be, except that any such annuity—

“(A) shall not commence before—

“(i) the day after the judicial official dies, or

“(ii) the first day of the second month beginning after the date on which the Director of the Administrative Office of the United States Courts receives written notice of the order, decree, agreement, or election, as the case may be, together with such additional information or documentation as the Director may prescribe,

whichever is later, and

“(B) shall terminate no later than the last day of the month before the former spouse remarries before becoming 55 years of age or dies.

"(4) For purposes of this section, a modification in a decree, order, agreement, or election referred to in paragraph (1) of this subsection shall not be effective—

"(A) if such modification is made after the retirement of the judicial official concerned, and

"(B) to the extent that such modification involves an annuity under this subsection."

(3X) Subsection (1) of section 376 of title 28, United States Code, (as amended by subsection (a)(4)(C) of this section) is amended by striking out the period at the end of the last sentence and by adding at the end the following: ", and by the amount of any annuity payable to a former spouse under subsection (t)."

(B) Subsection (n) of section 376 of such title is amended in the last sentence by inserting after "equity," the following: "except as provided in subsections (s) and (t)."

(C) Subsection (o) of section 376 of such title is amended in paragraphs (2) and (3) by inserting "or (t)" after "subsection (h)" each place it appears.

(4) Payments of retirement salary as defined in section 376(a)(2) of title 28, United States Code, which would otherwise be made to the judicial official upon whose service the retirement salary is based, shall be paid (in whole or in part) to another person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation. Any payment under this paragraph to a person bars recovery by any other person. This paragraph shall apply only to payments made after the date of receipt by the Director of the Administrative Office of United States Courts of written notice of such decree, order, or agreement, and such additional information and documentation as the Director may prescribe. As used in this paragraph, "court" means any court of any State or the District of Columbia.

(e) **EFFECTIVE DATE.**—This section shall take effect on October 1, 1986.

SEC. 3. REMOVAL JURISDICTION.

(a) **SECTION 1441 AMENDMENT.**—Section 1441 of title 28, United States Code, is amended by adding at the end the following new subsection:

"(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim."

(b) **EFFECTIVE DATE.**—The amendment made by this section shall apply with respect to claims in civil actions commenced in State courts on or after the date of the enactment of this section.

SEC. 4. TRAVEL EXPENSES OF JUSTICES AND JUDGES

(a) **SECTION 456 AMENDMENT.**—Section 456(a) of title 28, United States Code, is amended by striking out "for any continuous period" and all that follows through the end of the subsection and inserting in lieu thereof the following: "(1) all necessary transportation expenses; and (2) a per diem allowance for travel at the rate which the Director establishes not to exceed the maximum per diem allowance fixed by section 5702(a) of title 5, or actual and necessary expenses of subsistence actually incurred, notwithstanding the provisions of section 5702 of title 5, United States Code, in accordance with regulations which the Director shall prescribe with the approval of the Judicial Conference of the United States. In determining necessary expenses, the Director shall take into account the reasonable costs of transportation and subsistence generally incurred for travel to the geographic area involved."

(b) **EFFECTIVE DATE.**—The amendment made by this section shall take effect on October 1, 1986.

SEC. 5. COLLECTION OF FEES FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

(a) **SECTION 1914 AMENDMENT.**—Section 1914 of title 28, United States Code, relating to district court fees, is amended by striking out subsection (d).

(b) **EFFECTIVE DATE.**—The amendment made by this section shall apply with respect to any civil action, suit, or proceeding instituted on or after the date of the enactment of this Act.

SEC. 6. JUDICIAL REVIEW OF FEDERAL MARITIME COMMISSION AND MARITIME ADMINISTRATION ORDERS.

(a) **SECTION 2342 AMENDMENT.**—Section 2342(3) of title 28, United States Code, is amended to read as follows:

"(3) all rules, regulations, or final orders of—

"(A) the Secretary of Transportation issued pursuant to section 2, 9, 37, 41 or 43 of the Shipping Act, 1916 (46 U.S.C. App. 839); and

"(B) the Federal Maritime Commission issued pursuant to—

"(i) section 23, 25, or 43 of the Shipping Act, 1916 (46 U.S.C. App. 822, 824, or 841a);

"(ii) section 19 of the Merchant Marine Act, 1920 (46 U.S.C. App. 876);

"(iii) section 2, 3, 4, or 5 of the Intercoastal Shipping Act, 1933 (46 U.S.C. App. 844, 845, 845a, or 845b);

"(iv) section 14 or 17 of the Shipping Act of 1984 (46 U.S.C. App. 1713 or 1716); or

"(v) section 2(d) or 3(d) of the Act of November 6, 1966 (46 U.S.C. App. 817(d) or 817e(d))."

(b) **EFFECTIVE DATE.**—The amendment made by this section shall apply with respect to any rule, regulation, or final order described in such amendment which is issued on or after the date of the enactment of this Act.

SEC. 7. TECHNICAL AMENDMENTS.

(a) **REDESIGNATION OF DUPLICATE SECTIONS.**—

(1) **TITLE 28 AMENDMENTS.**—Chapter 85 of title 28, United States Code, is amended—

(A) in the table of sections by striking out

"1364. Senate Actions.

"1364. Construction of references to laws of the United States or Acts of Congress." and inserting in lieu thereof the following:

"1365. Senate Actions.

"1366. Construction of references to laws of the United States or Acts of Congress.";

(B) by striking out the section heading

"§1364. Senate actions"

and inserting in lieu thereof the following:

"§1365. Senate actions"; and

(C) by striking out the section heading

"§1364. Construction of references to laws of the United States or Acts of Congress"

and inserting in lieu thereof the following:

"§1366. Construction of references to laws of the United States or Acts of Congress".

(2) **CONFORMING AMENDMENT.**—Section 705(a) of the Ethics in Government Act of 1978 (P.L. 95-521; 2 U.S.C. 282d(a)) is amended by striking out "1364" and substituting "1365".

(b) **DELETION OF INCORRECT REFERENCES.**—Paragraph (3) of section 620(b) of title 28, United States Code, is amended—

(1) by striking out "referees"; and

(2) by substituting "magistrates" for "commissioners".

(c) **EFFECTIVE DATE.**—The amendments made by this section shall take effect on the date of the enactment of this Act.

PURPOSE OF LEGISLATION

The purpose of the legislation is to improve the administration of justice in the federal court system by reforming current law as relates to judicial survivors annuities, removal jurisdiction, travel expenses of judges, district court filing fees, judicial review in the courts of appeals for certain orders of the Federal Maritime Commission and the Maritime Administration, and several technical amendments to title 28 of the United States Code.

BACKGROUND

As relates to changes in current law, H.R. 3570 is divided into five independent and unrelated sections—judicial survivors annuities amendments, removal jurisdiction, travel expenses of justices

and judges, judicial review of Federal Maritime Commission and Maritime Commission orders, and technical amendments. In order to facilitate understanding of the bill, this background statement contains a separate discussion of each sectional heading.

JUDICIAL SURVIVORS ANNUITIES SYSTEM REFORM

In 1956,¹ after six years of consideration in both the House and Senate, the Congress created the Judicial Survivors Annuities (JSAS) program, thereby making available to judges in elective arrangement for providing survivorship benefits for their spouses and children. Completely revised and reformed in 1976,² the program became, for all judges, an example of Congressional responsiveness to apprehensions concerning ability of federal judges to provide a reasonable degree of material security for their families in an era of diminishing purchasing power and infrequent salary increases.

In 1976 Congress clearly believed it had finally established a program which would be an attractive enough investment to insure participation by all judges who needed to provide survivors' annuities protection for their families. That belief was based upon the premise that annuities payable would be regularly and predictably adjusted to reflect inflation in direct correlation to the extent to which judicial salaries increased in response to inflation. Indeed, one year before enactment of the 1976 reforms, Congress has passed legislation authorizing annual "comparability adjustments" in federal judicial salaries.³

The premise of annual adjustments in salaries, which would provide correlated adjustments in annuity benefit payments, did not prove reliable.⁴ Commencing in the same year in which the reforms were enacted—in 1976—annual "comparability adjustments" in judicial salaries were routinely precluded by various legislative or executive actions taken in response to immediate economic or political perceptions and pressures. As a result, annuity payment amounts have not increased as anticipated. Moreover, the investment attractiveness of the program has been eroded, as commercially marketed alternatives, such as investment retirement accounts, have understandably appeared to judges to be "better buys for the dollars." As a consequence, participation in the program by new judges entering on duty has dramatically diminished. In 1976, 90 percent of the total number of federal judges were participants in the program. Last year only 74 percent were participating. In 1978, 74 percent of "entering on duty" or newly appointed judges elected to participate; in each of the last three years, fewer than 25 percent of newly appointed judges have elected to participate. In

¹ Act of August 3, 1956, Pub. L. No. 84-973, 70 Stat. 1021. For an analysis of the 1956 Act., see H. Rep. No. 84-2170, 84th Cong., 2d Sess. (1956), reprinted in [1956] U.S. CODE CONG. ADM. NEWS 4354; S. Rep. No. 84-1983, 84th Cong., 2d Sess. (1956).

² Act of October 19, 1975, Pub. L. No. 94-554, 90 Stat. 2603. For the legislative history of the 1976 Act, see H. Rep. No. 94-1604, 94th Cong., 2d Sess. (1976), reprinted in [1976] U.S. CODE CONG. ADM. NEWS 5824; S. Rep. No. 94-799, 94th Cong., 2d Sess. (1976).

³ Act of August 9, 1975, Pub. L. No. 94-82, Title II, § 205, 89 Stat. 422.

⁴ See Hearings on Federal Judicial Improvements Before the House Judiciary Subcomm. on Courts, Civil Liberties and the Administration of Justice, 99th Cong., 1st Sess. (1985) (statement of the Judicial Conference of the United States).

essence, recently appointed federal judges are routinely concluding that the program is "a whistle which isn't worth the penny."⁵

Furthermore, federal judges have also long been concerned about the prolonged period of years of service needed to achieve annuity amounts which are adequate to meet present and future needs. Many individuals inside and outside the judiciary, believe that a minimum "floor annuity," and a more "accelerated" schedule of benefits amounts, are essential to making the program an attractive investment.

All of these factors, considered collectively, could ultimately result in the bankruptcy of the program. At the very least, inadequacies in the existing system have an effect on whether highly qualified individual accept or reject a Presidential call to become a federal judge or whether a sitting judge will stay on the bench or resign.⁶

Section 2 of H.R. 3570 therefore responds to these concerns, and several others.⁷ First, section 2 increases the judges' contribution rate—the percentage of salary which judges must invest each year. Second, it reforms the government's "matching contribution" obligation. Third, it frees children's annuities from their currently "frozen" condition. Fourth, section 2 modernizes the existing provision requiring surviving spouses to forfeit their annuity in the event they choose to remarry. Fifth, it revises the annuity computation formula to provide the accelerated schedule of benefit payments deemed by many judges to be essential to an attractive program by many judges. Sixth, it authorizes a fair minimum "floor annuity". Seventh, it permits the Deputy Director of the Administrative Office to elect to participate in the program. Eighth, it protects the rights of divorced spouses. Last, it allows individuals who presently do not participate in the program, to opt-in to the system. Those nine modifications can conveniently be discussed when grouped into three categories of changes made by H.R. 3570.

A. Reform of Annuity Amounts for Beneficiaries

Section 2 of H.R. 3570 effects reforms which would yield larger annuity amounts for beneficiaries. One reform will increase annuities paid to surviving children; another three reforms will increase annuity amounts received by surviving spouses.

1. Surviving Children's Annuities

At present under subsection (h)(1) of 28 U.S.C. §376, annuities are authorized for surviving children in two classes and annuity

⁵ See *Hearings Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 305-348 (1982) (statement of Judge Elmo Hunter).

⁶ See *Hearings on Federal Judicial Improvements*, *supra* note 4 (statement of Judge Spencer Williams). In his written testimony, Judge Williams quotes the often cited statement of former Judge William H. Mulligan, who aptly observed "I can afford to live on the salary of a federal judge but I can't afford to die on it."

⁷ This section includes the provisions of H.R. 3081 (Kastenmeier, for himself and Schroeder, Moorhead, Hyde, Frank, Kindness, Berman, Lagomarsino, Fazio, Wolf, Oberstar, Bentley, Leland, Jeffords, Martinez, Green, Conyers, Barnes, Morrison (of Connecticut), Moody, Burton (of California), Towns, Crockett, Williams, Gray (of Pennsylvania), Oaker, Ortiz, Rose, Derrick, Florio, Edwards (of California), Darden, Walgren, Swindall, Glickman, Young (of Florida), Boaco, Badham, Shelby, Lott, Gekas, Duncan, Rowland, Gingrich, Dannemeyer, Shelby, Jenkins, Fassel, Lehman (of Florida), Annunzio, Boner, Quillen, Thomas (of Georgia), Sundquist, Roybal, Luken, Chapman, Lloyd, Beville, Levin, Jones, Hall (of Texas), and Brown (of Colorado)) and H.R. 1472 (Green).

amounts are determined by statutorily designated dollar figures. If the judge's spouse is receiving a survivor's annuity under the program, each child shall receive an annuity of \$1,548 or \$4,644 divided by the number of children, whichever is smallest. If the judge's spouse is not receiving an annuity under the program, each child shall receive an annuity of \$1,860 or \$5,580 divided by the number of children, or the amount which a surviving spouse would have received divided by the number of children, whichever amount is smallest. If there are more than three children who survive a judge in the first class, each will receive less than \$129.00 each month; if there are more than three in the second class, each will receive less than \$155.00 each month.

Two basic faults are in need of corrections: first, statutorily designated amounts become increasingly inadequate as time passes; and second, whatever formula is substituted for designated amounts should provide reasonable adjustments in annuity amounts in relation to changing economic conditions. In response, section 2 of H.R. 3570 first eliminates statutorily designated amounts by substituting a formula, consisting of a stipulated percentage of the "high-three-year average annual salary" figure (which is used as the basis for computation of spousal annuities), and second sets that percentage high enough to insure a reasonable annuity amount.

For children in the first "class"—cases in which a surviving spouse is receiving an annuity—each child would receive either an annuity equal to 10 percent of the high-three-year figure or an amount equal to 20 percent of that figure divided by the number of children, whichever is smaller. When today's salaries have been paid for three years, the 10 percent figure would be \$7,870 for children of district judges and \$8,320 for those of circuit judges (\$656 per month and \$693 per month).

For children in the second "class"—cases in which a surviving spouse is not receiving an annuity—each child would receive an annuity equivalent to 20 percent of the high-three-year figure, or an amount equal to 40 percent of that figure divided by the number of children, or the amount which a surviving spouse would have received divided by the number of children, whichever is smaller. When today's salaries have been paid for three years, the 20 percent figure would be \$15,740 for children of district judges and \$16,640 for those of circuit judges (\$1,312 per month and \$1,387 per month).

2. Surviving Spousal Annuities

Currently, under subsection (1) of the 28 U.S.C. § 376, a surviving spouse's annuity is usually a direct product of the following formula:

$$\frac{(\text{high three year average annual salary})}{(\text{years of service})} \times .0125 = (\text{annuity amount})^*$$

* For a full explanation of the application of that formula, and the manner in which different types of creditable service are used in its application, see S. Rep. No. 94-799, *supra* note 2, at 32-34.

Under current law, an annuity amount "ceiling" of 40 percent of the "average annual salary" figure is statutorily mandated; no "floor" figure is authorized.

Given the .0125 formula factor that 40 percent ceiling figure is reached after 32 years of service ($40 \div .0125 = 32$). Therefore, all contributions made following the thirty-second year of service are purchasing no additional benefit. While very few judges serve for more than 32 years, that eventuality actually mitigates toward establishing an even higher ceiling—or perhaps 50 percent to 60 percent of the average annual salary figure—because the benefit in the few cases would far exceed additional costs to the program.

a. Increasing the ceiling for spousal annuities.—In 1976, when Congress last approved an increase in the JSAS program ceiling, extending the percentage of salary limitation from 37.5 to 40 percent, that change was firmly rooted in a direct correlation to the ceiling then impacting Members of Congress under the Civil Service Retirement program.⁹ The effect of the 1976 reform was one-dimensional; simply stated, two more years of service became creditable for annuity computation purposes. Increasing the ceiling percentage further—if that were to be the *only* change made—would still have exactly the same consequence; more years of service will be creditable. If the ceiling is set at 55 percent, service through 44 years will become creditable under the current program. Very few judges would ever be able to benefit from the change because few would serve the additional number of years. If the computation formula percentage factor is adjusted from the existing .0125 to .0150,¹⁰ however, retention of a 40 percent ceiling would result in the elimination of six years of service from creditability.

Section 2 responds to these policy needs by setting forth an amendment which would substitute a 55 percent ceiling for the existing 40 percent ceiling.

b. Establishing a floor for spousal annuities.—As noted above, the present program does not have a floor annuity amount. Establishment of one is perceived by many to be the most needed reform in the program. Considering the problems associated with statutorily designated dollar amounts (increasing inadequacy as time passes and dependency upon legislative enactment for remedial action), the most desirable method for providing a floor is the same method used for setting a ceiling: that is, by establishing a designated percentage of the average annual salary amount. The effect is once again perceived not only in terms of dollar amounts, but also in terms of years of service. If a floor is established in the present program at 20 percent, the amount will be equal to the computation-formula amount earned upon completion of 16 years of creditable service; if 30 percent, the equivalency reaches to 24 years. Because the floor thus becomes the guaranteed minimal amount, the greater the percentage, the greater the number of annuities which will be conferred at that level, and the greater the cost to the program in financial terms.

⁹ See *Id.* at 47-48.

¹⁰ See discussion at item c, *infra*.

Section 2 of H.R. 3570 opts for a 30 percent floor. Inadequate annuity amounts for survivors whose spouses die in the early years of judicial service constitute a problem very much in need of a remedy. When judges endure the consequences of salary compression, the only way to exempt surviving spouses and children from experiencing a life-long consequence of that compression is to establish a reasonable minimum annuity amount. In the view of the Committee, a 30 percent floor is reasonable.

C. Modification of the computation formula percentage factor.—Section 2 of H.R. 3570 increases the computation formula factor from .0125 to .1050. Because the one element in the computation formula which has the greatest direct influence upon year-by-year increases in annuity amounts—which most directly confers a “premium” for each year of service—is the abstract percentage factor, increasing that factor from .0125 to perhaps .0150 or .0200 is perhaps the most effective way to realize more adequate annuity amounts and directly recognize both a judge’s service and his or her participation in the program. The value of such reform in terms of a structure which rewards each additional year of service is obvious.

B. Preservation of the Program’s Financial Integrity

The proposed amendments to increase annuity amounts inevitably have direct financial consequences. Just as benefit amounts vary depending upon the combination of the reforms, so too do the costs to the program. As the costs increase, income must increase to compensate the investment fund. Actuarial evaluation have been conducted by the Judicial Conference to assess the “percentage of salary” necessary to keep the investment fund actuarially sound.

Pursuant to current law (28 U.S.C. § 376(c)), judges who elect to join the program contribute 4.5 percent of their salaries, and the government matches their contributions. Fund earnings, plus the two types of contributions, constitute the program’s sources of income. Actuarial studies indicate that the combined 4.5 percent plus the 4.5 percent contribution rate very slightly exceeds the 8.58 percent rate necessary to preserve actuarial soundness.

The benefit package incorporated in the draft bill—a .0150 computation factor, a .30 floor, and a .55 ceiling—is actuarially estimated to require annual funding equivalent to 13.16 percent of salary. If the existing matching contribution arrangement were preserved, both judges and the government would have to pay between 6.5 and 7.0 percent of salary per year to adequately fund the reformed program. Given the present level of judicial salaries, a modification of the matching contribution arrangement becomes appropriate. It is the view of the Committee that slightly increasing judges’ contributions and seeking necessary remaining funds from general appropriation would be a justifiable change in the program. Fortunately, an easy method exists for doing just that.

The Administrative Office of the United States Courts must file annually a complete actuarial report on the Judicial Survivors’ Annuities program with both the Comptroller General and Con-

gress.¹¹ The first such report was filed in 1980. Because compliance with the new reporting requirement conveniently provides a regular assessment of the program's actuarial condition, that requirement will easily lend itself to use as a thermometer with which the amounts in excess of those contributed by participating judges and investment earnings can be measured on an annual basis. In 1984, assuming that judges commence contributing 5.0 percent of salary instead of 4.5 percent, and the government contributes, in lieu of a statutorily established matching amount, that amount identified as necessary to maintain the financial integrity of the program in accordance with each annual actuarial study, the government contribution is estimated to be 8.16 percent for the "benefit package" incorporated into the bill.

In order to ensure that the government match does not rise to a fiscally unacceptable figure—for example, over 9.0 percent—the Comptroller General of the United States is given increased authority to prescribe the "unfunded liability" of the Judicial Survivors' Annuities Fund. The unfunded liability means the estimated excess determined on an annual basis by the Comptroller of the present value of all benefits payable from the Fund, over the sum of (1) the present value of deductions to be withheld from judicial pay; plus (2) the balance of the Fund as of the date the unfunded liability is determined. If the amount of the government's contribution rises too high, the Committee will immediately take action to increase the contribution required from federal judges to either 5.5 percent or possibly even 6.0 percent of salary. Stated otherwise, the actuarial soundness of the JSAS program depends both on contributing judges and the government. The fact that the government no longer pays a matching amount should in no way immunize judges from being required to pay a higher percentage of salary should the need arise in the future.

C. Adjustment of Eligibility Standards

When the 1976 Reform Act was processed, the period of program participation in a married status required as a precondition to establishing eligibility for a spousal survivor's annuity was reduced from two years to one year. That modification was a direct result of a similar reduction in the same eligibility period under the Civil Service Retirement statute.¹² At the time of the cost for the change was estimated to be inconsequential. Within two years after enactment of the 1976 Reform Act, Congress revised both the Social Security and Civil Service Retirement program criteria to permit widowed annuitants who had attained age 60 to remarry and retain their survivors' benefits under those two programs.¹³ Prior to those changes, widows who remarried lost their benefits, regardless of age at the time of their remarriage, just as do widows and widowers under the Judicial Survivors' Annuity statute today pursuant to 28 U.S.C. § 376(h)(2). Bills pending in the House and Senate have proposed that comparable change should be made in the judicial

¹¹ See Act of Nov. 4, 1978, Pub. L. No. 95-595, 92 Stat. 2541 and Annual Reports filed by the Director of the Administrative Office of the U.S. Courts pursuant to Public Law 95-595.

¹² See S. Rep. No. 94-799, *supra* note 2, at 42.

¹³ See Act of Dec. 20, 1977, Pub. L. No. 95-216, 91 Stat. 1509; and Act of July 10, 1978, Pub. L. 95-318, 92 Stat. 384.

survivors annuities program.¹⁴ Just last year, Congress again revised provisions in the Social Security and Civil Service Retirement programs, reducing the age 60 criteria to age 55.¹⁵ H.R. 3570 tracks that reform by providing that the same age criteria be established for the Judicial Survivors' Annuity program.

Section 2 of H.R. 3570 also permits a Deputy Director of the Administrative Office to elect to participate in the program under the same arrangement which presently permits the Director to do so.

D. Provisions Relating to Opting-In and Opting-Out of the Program

Section 2 expressly authorizes full retention of earned creditable service by present program participants without assessing additional costs for the derived benefit. When Congress approved the 1976 Reform Act, an authorization was deliberately included to permit judges then participating to transfer into the reformed program those years of creditable service already accumulated—without requiring any additional contribution to cover the cost of the enhanced benefits.¹⁶ In other words, a judge "carrying over" could apply his or her years of service at the pre-existing 3 percent contribution rate in application of an annuity computation formula correlated to the new 4.5 percent contribution rate. The shortfall to the fund was simply absorbed by the fund. As previously noted, there is today a margin of safety outstanding in the fund (the difference between the 9 percent total contribution income rate and the actuarially necessary 8.58 sustaining rate) and actuarial studies indicate that that margin can be relied upon to absorb the cost of again providing express statutory authority for a carry over of creditable service. Section 2 of H.R. 3570 simply duplicates the authorization contained in the 1976 Reform Act.

Moreover, section 2 authorizes an "open season" of 180 days following the legislation's effective date during which any existing program participant who wishes to leave the program may do so without penalty. In approving the 1976 Reform Act Congress similarly provided a period of 180 days during which judges could choose to carry over into the reformed program or withdraw from the old program and receive a complete refund of contributions plus interest.¹⁷ Recognizing that individual judges might not wish to continue participating at higher contribution rates, Congress permitted them to fully withdraw from the program. In this regard, section 2 duplicates the authorization contained in the 1976 Reform Act.

Last, as was done in the 1976 Reform Act, section 2 authorizes any judge or justice now serving, who has not elected to participate in the JSAS program, to make such an election during a time period following the date of enactment of the act. Such an express "opt-in" period would eliminate any question that might occur if the statute was silent on this point. It goes without saying that any judges who elect to participate will be required to deposit amounts

¹⁴ See H.R. 1472, 99th Cong., 1st Sess. (1985) (Green) and S. 1063, 99th Cong., 1st Sess. (1985) (D'Amato). For further information, see House Hearings on Federal Judicial Improvements, *supra* note 4 (statement of Cong. Bill Green).

¹⁵ Act of Nov. 8, 1984, Pub. L. 98-615, 98 Stat. 3195.

¹⁶ See Section 6 of Pub. L. No. 94-554, *supra* note 2.

¹⁷ See *Id.*, Section 7.

necessary to qualify their service for credit under the program. Hopefully, greater participation in the program will occur, thereby strengthening the actuarial soundness of the entire annuity system.

REMOVAL JURISDICTION

Legislation, originally proposed by Congressman Synar,¹⁸ identified a serious statutory gap affecting the relationship between state and federal courts.

Current Law—Section 1441 of Title 28, United States Code—generally provides that defendants may remove to federal court civil cases commenced in state courts over which the federal district courts have original jurisdiction. This rule operates straightforwardly in cases within the concurrent jurisdiction of the state and federal courts. Peculiarly, however, a caselaw gloss on section 1441 bars removal to federal court of a case within the exclusive jurisdiction of the federal courts, which was improperly commenced in state court. If a defendant attempts to remove such a case to a federal district court, the district court is required to dismiss it. Further proceedings then depend on the plaintiff refiling the case in federal court.¹⁹

Whatever conceptual legal symmetry this jurisdictional rule may represent, it has no practical benefits. Experts on the subject have broadly criticized the rule. According to the Department of Justice:

This prohibition on removal under §1441 of a case over which the state court lacked jurisdiction seems to further no intelligible policy, and it involves a wasteful requirement of dismissal and refiling.²⁰

The purpose of section 3 of H.R. 3570 is to abolish the present judicial rule that an improvidently brought state civil action, the subject matter of which is within the exclusive jurisdiction of a federal district court, must be dismissed when it is removed to the district court by the defendant under 28 U.S.C. §1441. The theory behind the current rule is that removal confers only "derivative jurisdiction" on the federal courts; and therefore, since the state court lacked subject matter jurisdiction of the civil action, the federal court cannot acquire subject matter jurisdiction by removal. The doctrine dates back to *Lambert Run Coal Co. v. Baltimore and Ohio Rail Co.*, 258 U.S. 377, 382 (1922), and has been reconfirmed as recently as *Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 note 27 (1983).²¹ Section 3 eliminates this arcane rule, so wasteful to finite judicial resources.

Section 3 is supported, in principle, by the Judicial Conference and the Department of Justice. The Judicial Conference would prefer that the same result be achieved by amending §1441 to pro-

¹⁸ See H.R. 2446, 98th Cong., 1st Sess. (1985).

¹⁹ See generally 130 Cong. Rec. E2029-30 (daily ed. May 8, 1985) (remarks of Cong. Synar concerning H.R. 2446); C. Wright, *The Law of Federal Courts* 212 (4th ed. 1983); Wright, Miller & Cooper, *Federal Practices and Procedure: Jurisdiction* §3721 at 195-200 (1985); American Law Institution, *Study of the Division of Jurisdiction Between State and Federal Courts* 206-07 (1969).

²⁰ See Hearings on Federal Judicial Improvements, *supra* note 4 (statement of Dennis Mulholland).

²¹ See *Id.* (statement of the Judicial Conference of the United States).

vide that original jurisdiction should be modified by the addition of the terms "exclusive or concurrent". In the view of the Committee, this statutory clarification is not necessary, as it already is implicit that both terms are covered.

One commentator on the bill (Professor Thomas Rowe of Duke University School of Law) suggested statutory clarification on the question of the impact of the bill on territorial jurisdiction. Federal courts are often confined to the long-arm authority of the courts of the state in which they sit. The Committee does not intend to cure any defect in territorial jurisdiction.

TRAVEL EXPENSES OF JUSTICES AND JUDGES

Current law (28 U.S.C. § 456) incorporates a complicated set of rules for reimbursement of expenses for judges and justices who travel on official duty status. It provides for (1) reimbursement of necessary transportation expenses, (2) a per diem allowance or reimbursement for actual and necessary subsistence expenses subject to the dollar limits in the general statute governing travel expenses for federal employees, 5 U.S.C. § 5702, and (3) reimbursement of necessary travel expenses and actual and necessary subsistence expenses while on assignment pursuant to chapter 13 of title 28 for a continuous period of at least thirty days in accordance with regulations prescribed by the Director of the Administrative Office of the Courts with the approval of the Judicial Conference.

The subject of actual travel expenses is obviously of considerable importance to the administration of the Federal judiciary, and to parties, including the Department of Justice, that depend on the availability of sufficient judicial manpower to hear and decide cases promptly in the various areas of the country. The ongoing efforts to fight crime by dispatching Federal judges to areas of the country where criminal activities are on the rise is implicated. The general policy reflected in chapter 12 of title 28 is the maintenance of a mobile, nationwide corps of judges the members of which can be moved freely from one area to another to meet shifting case-loads. To the extent that the judiciary is inhibited in temporarily assigning judges to other courts or locations by inadequate provision for reimbursement of travel expenses, this policy is undermined or defeated.

As aptly noted by one federal judge, "[t]he previous situation, where judges often had to pay part of their own work expenses, was unfair, undignified, inefficient (discouraging judges from going where needed) and undemocratic (reinforcing the tendency to limit the judiciary to those of independent means).²² In a similar vein, another federal judge has testified: "Judges are required to travel to carry out their judicial duties and should not be forced to bear the expenses of mandatory travel."²³

Section 4 of H.R. 3570 does away with this inequity and unfairness by amending section 456 of title 28, United States Code, to provide that judges can be reimbursed for actual and necessary

²² Letter to Hon. Robert W. Kastenmeier from Hon. Stephen Breyer (dated September 29, 1982).

²³ See Hearings Federal Judicial Improvements, *supra* note 4, (statement of Judge Spencer Williams).

transportation and reasonable subsistence expenses incurred while working away from their official duty stations.²⁴ Subsistence expenses must however be "reasonable". Reimbursement for actual expenses will be subjected to a regulatory structure prescribed by the Director of the Administrative Office of the U.S. Courts with the approval of the Judicial Conference of the United States to ensure that abuses do not occur.

COLLECTION OF FEES FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

H.R. 3570—in section 5—amends section 1914 of title 28, United States Code, to bring civil filing fees charged in the United States District Court for the District of Columbia into line with all other Federal district courts.²⁵

The exemption of the D.C. District Court from the general fee provision originated in a period preceding the creation of the local court system in the District of Columbia, in which the D.C. District Court was still responsible for cases arising under local D.C. law. Its purpose was to preserve the applicability of fee schedules in the D.C. Code geared to the partially local nature of the caseload of the D.C. District Court. Since local cases are now handled in the District of Columbia courts, there is no evident reason why the fees charged in the Federal District Court for the District of Columbia should differ from those charged in other Federal district courts.

When title 28 was recodified in 1948, subsection 1914(d) of title 28, United States Code, was designed to exempt the District of Columbia from the filing and miscellaneous fees established for all other federal district courts in order to preserve the existing fees and costs prescribed by section 11-1509 of the District of Columbia Code, 1940 ed. The District of Columbia Court Reorganization Act of 1970 left in force and effect the fees and changes previously set forth for the United States District Court of Columbia.

In 1978 section 1914 of title 28, United States Code, was amended by section 244 of the Bankruptcy Reform Act to increase the amount of the filing fee in federal district courts generally from \$15 to \$60. No action, however, was then taken to remove the Federal District Court for the District of Columbia from the schedule of fees and costs set forth in the District of Columbia Code.

Section 5 of H.R. 3570 accomplishes the objective of placing the District Court for the District of Columbia on an equal footing with all other Federal District Courts.

JUDICIAL REVIEW OF FEDERAL MARITIME COMMISSION AND MARITIME ADMINISTRATION ORDERS

The primary purpose of section 6 of H.R. 3570 is to clarify the intended impact of the Shipping Act of 1984 (46 U.S.C. sec. 1701 et seq.) on judicial review of orders issued by the Federal Maritime Commission and the Maritime Administration in the Department

²⁴ Section 4 generally tracks the contents of H.R. 3561, 98th Cong., 1st Sess. (1985) (Kastenmeier).

²⁵ Section 5 is derived from H.R. 2724, 99th Cong., 1st Sess. (1985) (Kastenmeier).

of Transportation.²⁶ Prior to, and continuing after, enactment of the Shipping Act of 1984, 28 U.S.C. section 2342(3) provided that the United States court of appeals had exclusive jurisdiction to enjoin, set aside, suspend, or to determine the validity of—

such final orders of the Federal Maritime Commission or the Maritime Administration entered under chapter 23 (Shipping Act of 1916) and 23A (Intercoastal Shipping Act of 1933) of title 46 as are subject to judicial review under section 830 (section 31 of the Shipping Act of 1916) of title 46.

Under this provision prior to the 1984 Act, all orders of the Federal Maritime Commission and the Maritime Administration were reviewable only in the courts of appeals, except orders issued under section 19 of the Merchant Marine Act of 1920 (46 U.S.C. sec. 876). The Shipping Act of 1984, in effect, took part of the subject matter regulated under the Shipping Act of 1916 (foreign commerce) and shifted it to a new regulatory scheme. The 1984 Act, however, failed to expressly provide for judicial review of most of the Federal Commission orders under that Act. The 1984 Act did not provide for review under "chapter 158 of title 28, United States Code" (review of orders of Federal agencies) of Commission orders assessing civil penalties. Since review of agency orders in the United States courts of appeals is available only pursuant to specific authority, the result would be that review of orders under 1984 Act, other than those assessing civil penalties, could be had only in the Federal district courts pursuant to 5 U.S.C. sections 702-704 and 28 U.S.C. section 1331. Nothing in the legislative history of the 1984 Act suggests that Congress intended this result.

The failure of the history to address judicial review suggests that Congress may have inadvertently failed to make conforming amendments to Title 28 of the United States Code necessary to continue court of appeals review of the subject matter excised from the 1916 Act and restructured in a separate statute. This section is drafted to restore court of appeals review of the subject matter as in the past, an outcome that Congress probably assumed, but failed to accomplish when passing the 1984 Shipping Act.

Furthermore, in order to remedy this situation, the Senate Committee on Commerce, Science, and Transportation amended S. 679, the Maritime Appropriation Authorization Act for Fiscal Year 1986, by the addition of a section 4, which would amend the Hobbs Act so that it would apply to all Federal Maritime Commission final orders entered under title 46, United States Code. However, the Senate amendment did not effectuate changes relating to the review authority of the Maritime Administration (Department of Transportation) under the Hobbs Act. S. 679 passed the Senate on June 5, 1985, and was thereafter referred to the House Merchant Marine and Fisheries Committee. During House consideration of the Senate bill, the pertinent jurisdictional provision was deleted,

²⁶ See Hearings on Federal Judicial Improvements, *supra* note 4 (statements of James J. Carey (on behalf of the Federal Maritime Commission) and Jim J. Marquez on behalf of the Department of Transportation).

and ever since then the Merchant Marine and Fisheries Committee and this Committee have worked cooperatively to cure the defect.

On July 18, 1985, Chairman Rodino introduced H.R. 3049 to amend the Hobbs Act in order to clarify review authority of *both* the Federal Maritime Commission and the Maritime Administration. Section 6 of H.R. 3570 tracks the contents of H.R. 3049.

TECHNICAL AMENDMENTS

Occasionally technical drafting problems in title 28, United States Code, are brought to the attention of the Committee by federal judges, personnel of the Administrative Office of the U.S. Courts, or judicial administrators.

For example, a representative of the Administrative Office (Paul Summit, Counsel, Legislative Affairs Office) notified the Committee that there were three sections of the same number (§ 1364) in title 28 of the United States Code. These sections relate to (1) Direct actions against insurers of members of diplomatic missions and their families; (2) Senate actions; and (3) Construction of references to laws of the United States on Acts of Congress. The confusion caused by having three sections of the same number is obvious, and section 7 of H.R. 3570 takes the necessary steps to remember these sections.

Similarly, during an oversight hearing on the Federal Judicial Center, it was brought to the attention of the Committee that the statutory charter of the Center was in need of a technical amendment.²⁷ Section 620(b)(3) of title 28, United States Code, refers to referees and U.S. commissioners instead of bankruptcy judges and magistrates. These misreferences were initially corrected in the Bankruptcy Reform Act and then later repealed. Section 7 once again makes the necessary corrections.

STATEMENT

During the 99th Congress, the Committee—acting through the Subcommittee on Courts, Civil Liberties and the Administration of Justice, chaired by the Honorable Robert W. Kastenmeier—held a day of hearings on various bills to improve the administration of justice by the Federal courts.²⁸ On the table were the following bills: H.R. 1472, H.R. 2187, H.R. 2446, H.R. 2561, H.R. 2724, H.R. 3044, H.R. 3049, and H.R. 3081.

Testimony was received from Judge Elmo Hunter (Chairman, Committee on Court Administration), Judge Frank Coffin (Chairman, Committee on the Judicial Branch), Judge Charles Clark (Chairman, Committee on the Budget) all representing the Judicial Conference of the United States; Dennis Mullins (Deputy Assistant Attorney General, Office of Legal Policy, United States Department of Justice); and Judge Spencer Williams (President, Federal Judges Association).

²⁷ See Hearings on the Federal Judicial Center Before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, 98th Cong., 1st Sess. 6 (1985) (statement of A. Leo Levin, Director, Federal Judicial Center).

²⁸ The hearing was held on July 29, 1985. See Hearing on Federal Judicial Improvements *supra* note 4.

Written statements have also been submitted by the United States Department of Transportation (Jim J. Marquez, General Counsel), the Federal Maritime Commission (James J. Carey, Vice Chairman), and the American Institute for Shippers' Association, Inc. (Ronald N. Cobert, General Counsel) on H.R. 3049; by Congressman Bill Green on H.R. 1472; by Congressman James M. Jeffords on H.R. 3081; and by the United States Tax Court (Samuel B. Sterrett, Chief Judge) on H.R. 2561; and by the American Bar Association.

On October 1, 1985, the Subcommittee on Courts, Civil Liberties and the Administration of Justice marked-up a Committee Print composed of various judicial improvements. The bill, after amendment, was reported favorably in the form of a clean bill (see H.R. 3570). Fourteen Members of the subcommittee (Kastenmeier, for himself, Moorhead, Mazzoli, Synar, Schroeder, Frank, Morrison (of Connecticut), Berman, Boucher, Hyde, Kindness, DeWine, Swindall, and Brooks)²⁹ have cosponsored the bill.

On November 19, 1985, the full Committee met, and a quorum of Members being present, considered H.R. 3570. After adoption of two amendments (discussed in the text of the sectional analysis), the bill, as amended, was ordered favorably reported by voice to the full House.

SECTIONAL ANALYSIS

SHORT TITLE

Section 1 of the bill is the short title: Judicial Improvements Act of 1985.

JUDICIAL SURVIVORS' ANNUITIES AMENDMENTS

Section 2 reforms and improves the existing annuities program for survivors of Federal justices and judges by amending section 376 of title 28, United States Code, in several important regards. Section 2 contains five subsections, relating to benefit reforms, beneficiaries, revocation, annuities for former spouses, and effective date.

Subsection (a) of section 2, relating to benefit reforms, sets forth amendments to subsections (a)(b)(c)(d)(h)(n) and (o) of title 28, United States Code. In addition, two new subsections ((s) and (t)) are created.

Paragraph (1) of subsection (a) amends subsections (b) and (d) of title 28, thereby increasing each district judge's contribution to the JSAS Fund from 4.5 percent of salary to 5 percent or from approximately \$3,542 to \$3,935 per year. The present salaries of U.S. district and circuit court judges are \$78,700 and \$83,200 respectively. Implicitly, the bill changes the government's contribution from the current statutorily prescribed "matching amount" to that amount identified as necessary to maintain the actuarial integrity of the program in accordance with each annual actuarial study. Since 1978 the Administrative Office of the United States Courts has

²⁹ The following Members of the House have joined as cosponsors: Shaw, Green, Sundquist, Quillen, Lloyd, Barnard, Perkins, Ray, Andrews, Gordon, Latta, Hutto, Kaptur, and Kildee.

been required by statute to file annually a complete actuarial report on the Judicial Survivors' Annuities program with both the Comptroller General and Congress. Under the actuarial studies completed for the Judicial Conference, the program life sustaining government contribution is estimated to be 8.16 percent for the "benefit package" contained in the bill. If the legislation proves successful, it is expected that this contribution will be reduced.

Paragraph (1) also eliminates any questions which may arise from the existing statutory reference to the effective date of the 1976 amendments (January 1, 1977) and authorizes judges now serving who have not previously elected to participate in the JSAS program to make such an election. Judges who wish to elect into the program must do so before July 1, 1987, and must further deposit amounts required to qualify their past service for credit under the program.¹

Paragraph (2) of subsection (a) amends subsection (c) of section 376, United States Code, to provide that there shall be deposited to the credit of the Judicial Survivors' Annuities Fund, in accordance with such procedures as the Comptroller of the United States may prescribe, amounts required to reduce to zero the annually estimated "unfunded liability" of the Fund. Such deposits shall be taken from the fund used to pay the compensation of the judicial officer, and shall immediately become an integrated part of the Fund for any use required by pertinent law. Unfunded liability is defined as the estimated excess, determined by the Comptroller General on an annual basis, of the present value of all benefits payable from the Fund over the total sum of (1) the present value of deductions to be withheld from the future basic pay of judicial officials added to (2) the balance of the Fund as of the date the unfunded liability is determined. In making determinations, the Comptroller General must use the applicable information contained in the reports about Government pension plans filed in accordance with 31 U.S.C. § 9503.

Paragraph (3) increases the benefits earned for each year of judicial service from 1¼ percent of annual salary to 1½ percent and provides a minimum allowance of 30 percent of average high-three-year salary, or \$23,610 for the survivor of a district judge. This "floor" of 30 percent is intended to protect the survivors of judges who die at a relatively early age. The maximum allowance would be 55 percent of average high-three-year salary, or approximately \$43,285 for district judges, which would take between 36 and 37 years of judicial service to earn. Under the present program the maximum allowance is 40 percent and there is no minimum "floor" annuity amount.

Adjustments in annuity amounts paid to the surviving children of judges are also provided for in subsection 2(a)(3) of the bill. At present annuities are authorized for surviving children in two "classes" and annuity amounts are determined by statutorily designated dollar figures. Paragraph (3) of section (a) would eliminate statutorily designated amounts by substituting a "formula".

¹ This opt-in provision was added in full Committee by an amendment offered by Congressman Moorhead.

For children in the first "class"—cases in which a surviving spouse is receiving an annuity—each child would receive either an annuity equal to 10 percent of the high-three-year figure or an amount equal to 20 percent of that figure divided by the number of children, whichever is smaller. When today's salaries have been paid for three years, the 10 percent figure would be \$7,600 for children of district judges and \$8,040 for those of circuit judges (\$633 per month and \$670 per month).

For children in the second "class"—cases in which a surviving spouse is not receiving an annuity—each child would receive an annuity equivalent to 20 percent of the high-three-year figure, or an amount equal to 40 percent of that figure divided by the number of children, or the amount which a surviving spouse would have received divided by the number of children, whichever is smaller. When today's salaries have been paid for three years, the 20 percent figure would be \$15,200 for children of district judges and \$16,080 for those of circuit judges (\$1,267 per month and \$1,340 per month).

Paragraph (3) would also amend 28 U.S.C. subsection 376(h), to provide that an annuity payable to the surviving spouse of a judge is not to be terminated by remarriage of the surviving spouse after attaining the age of fifty five. This change reflects concern for the situation of surviving spouses who are considering marriage at a point in their lives at which neither they nor a potential spouse are likely to have any long-term sources of income other than retirement income, and who might otherwise be forced to choose between refraining from marriage and incurring financial hardship.

A last amendment made by paragraph (3) permits the Deputy Director of the Administrative Office of U.S. Courts to elect to participate in the program under the same arrangement which presently permits the Director to do so.

Subsection (b) of section 2 relates to beneficiaries. It expressly authorizes full retention of earned creditable service by present program participants without assessing additional costs for the derived benefit. When Congress approved the 1976 Reform Act, a similar authorization was included to permit judges then participating to "carry over" into the reformed program those years of creditable service already accumulated. An additional contribution to cover the cost of the enhanced benefits was not required. See Section 6 of Pub. L. No. 94-554. Under the 1976 Act, a judge "carrying over" could apply years of service at the pre-existing 3 percent contribution rate in application of an annuity computation formula correlated to the new 4.5 percent contribution rate. The "short fall" to the fund was simply absorbed by the fund. Today, there is a "margin of safety" outstanding in the fund (the "short term" to the fund was simply absorbed by the fund. Today, there is a "margin of safety" outstanding in the fund (the difference between the 9 percent total contribution income rate and the actuarially necessary 8.58 "sustaining rate") and actuarial studies indicate that that "margin" can be relied upon to absorb the cost of again providing express statutory authority for a "carry over" of creditable service. Section 3 of the draft bill therefore simply duplicates the authorization contained in the 1976 Reform Act.

Subsection (c) of section 2 creates an "open season" of 180 days following the legislation's effective date during which any existing program participant who wishes to leave the program may do so without penalty. In approving the 1976 Reform Act, Congress also authorized a period of 180 days during which judges could choose to "opt in" into the reformed program or "opt out" of the old program and receive a complete refund of contributions plus interest. Recognizing that individual judges might not wish to continue participating at higher contribution rates, Congress permitted them to fully withdraw from the program. Subsection (c) is patterned after the authorization contained in the 1976 Reform Act.

Subsection (d) of section 2 relates to the subject of annuities for former spouses.² An elaborate statutory scheme is set forth to accomplish two rather simple policy objectives: first, to allow spouses of Federal justices and judges who become divorced after the bill's effective date to be eligible to receive a portion of the annuity, either current or survivors, if a court order or court-approved property settlement so provides; and second, to allow a judicial officer, if already divorced, to elect voluntarily to provide survivor benefits for the former spouse. The language of subsection (d) is modeled after language previously enacted by Congress for Foreign Service, CIA, Civil Service, and military personnel, as well as language included in the Social Security Act.

Last, subsection (e) of section 2 merely provides an "effective date" of October 1, 1986, for judicial survivor's annuity reform. This section conforms with requirements of the Budget Act.

REMOVAL JURISDICTION

Section 3 of the bill amends 28 U.S.C. §1441 to permit a civil action brought in a state court of which the federal district courts have exclusive—as distinguished from concurrent—original jurisdiction, to be removed by a defendant to the appropriate federal district court. To be specific, subsection (a) amends section 1441 title 28, United States Code, to provide that a federal court to which an action is removed from state court is not precluded from hearing and determining a claim because the state court lacked jurisdiction over that claim. Subsection (b) clarifies that the amendment made by this section shall not apply with respect to claims in civil actions commenced in state courts on or after the date of enactment of the proposed legislation.

TRAVEL EXPENSES OF JUSTICES AND JUDGES

Section 4 amends current law (28 U.S.C. §456) governing reimbursement of travel expenses for judges while working away from their official duty stations. The amendment provides generally that judges are to be reimbursed for necessary transportation and reasonable subsistence expenses incurred in such circumstances, in accordance with regulations prescribed by the Director of the Administrative Office of the U.S. Courts with the approval of the Judicial

² This subsection was added in the full Committee by an amendment offered by Congresswoman Schroeder. Having previously been discussed but not offered in subcommittee, the amendment was passed by voice vote, no opposition having been expressed.

Conference. Judges may continue to elect to receive a per diem allowance for travel. Section 4 would apply across the board the approach now taken in connection with travel expenses incurred on temporary assignments of active judges to other courts and assignments of senior judges, the duration of which is thirty days or longer.

In order to comply with Budget Act requirements, subsection (b) provides that section 4 becomes effective on October 1, 1986.

FEES FOR U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Section 5 of the bill relates to the collection of fees for the United States District Court for the District of Columbia. Section 5 deletes subsection (d) of 28 U.S.C. § 1914, which excludes the District Court for the District of Columbia from the general statute governing fees in Federal district courts. The effect of this amendment would be to make the fees charged in the D.C. District Court the same as the fees charged in other district courts: that is, the fee for filing a civil action would be \$60.00, as opposed to \$10.00.

To insure fair and effective implementation of section 5, with adequate communication of the changed fee structure to lawyers and litigants in the District of Columbia, subsection (b) specifies that section 5 only applies to civil actions, suits, and proceedings instituted on or after the date of enactment of the section.

JUDICIAL REVIEW OF FEDERAL MARITIME COMMISSION AND MARITIME ADMINISTRATION ORDERS

Section 6 would amend 28 U.S.C. section 2342 to provide for judicial review of certain orders of the Federal Maritime Commission and the Maritime Administration in the United States Courts of Appeals.

Subsection (a) amends section 2342(3) of title 28, United States Code, by clarifying that the courts of appeals (other than the United States Court of Appeals for the Federal Circuit) have exclusive jurisdiction to enjoy, set aside, suspend (in whole or in part), or to determine the validity of all rules, regulations, or final orders arising from the Maritime Administration (in the Department of Transportation) or the Federal Maritime Commission in the following subject areas: of the Secretary of Transportation issued pursuant to section 2, 9, 37, 41, or 43 of the Shipping Act, 1916 (46 U.S.C. App. 839); and of the Federal Maritime Commission issued pursuant to section 23, 25, or 43 of the Shipping Act, 1916 (46 U.S.C. App. 822, 824, and 841a); section 19 of the Merchant Marine Act, 1920 (46 U.S.C. App. 876); section 2, 3, 4, or 5 of the Intercoastal Shipping Act, 1933 (46 U.S.C. App. 844, 845, 845a or 845b); section 14 or 17 of the Shipping Act of 1984 (46 U.S.C. App. 1713 or 1716); or section 2(d) or 3(d) of the Act of November 6, 1966 (46 U.S.C. App. 817d(d) or 817e(d)).

Subsection (b) of section 6 provides that the amendment made by this section applies with respect to any rule, regulation, or final order described in such amendment which is issued on or after the date of enactment of the Act.

TECHNICAL AMENDMENTS

Section 7 of the bill sets forth several technical amendments to Title 28, United States Code, that have been brought to the attention of the subcommittee.

Subsection (a) redesignates three sections in Title 28 that are designated as section 1364.

Subsection (b) makes two technical corrections to the statutory charter of the Federal Judicial Center. The first change deletes the word "referees", which referred to bankruptcy referees. Referees are now considered to be judges and so a separate reference is no longer necessary. The second change inserts the word "magistrates" for "commissioners" to reflect the present status of United States Magistrates in the Federal judicial system.

Section 7 takes effect on the date of enactment of the Act.

OVERSIGHT FINDINGS

The Committee makes the oversight finding found in this report with respect to this legislation.

In regard to clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives, no oversight findings have been submitted to the Committee by the Committee on Government Operations.

NEW BUDGET AUTHORITY

In regard to clause 2(1)(3)(B) of rule XI of the Rules of the House of Representatives, the bill creates no new budget authority on increased tax expenditures for the Federal government.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(1)(4) of rule XI of the Rules of the House of Representatives, the committee feels that the bill will have no foreseeable inflationary impact on prices or costs in the operation of the national economy.

FEDERAL ADVISORY COMMITTEE ACT OF 1972

The Committee finds that this legislation does not create any new advisory committees within the meaning of the Federal Advisory Committee Act of 1972.

COST ESTIMATE

In regard to clause 7 of rule XIII of the Rules of the House of Representatives, the Committee agrees with the cost estimate of the Congressional Budget Office.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, December 5, 1985.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate for H.R. 3570, the Judicial Im-

provements Act of 1985, as ordered reported by the House Committee on the Judiciary on November 19, 1985.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

JAMES BLUM,
(for Rudolph G. Penner).

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

1. Bill number: H.R. 3570.
2. Bill title: Judicial Improvements Act of 1985.
3. Bill status: As ordered reported by the House Committee on the Judiciary on November 19, 1985.
4. Bill purpose: To reform and improve the federal justices and judges survivors' annuities program, and for other purposes.
5. Estimated effect on the Federal budget:

(By fiscal years, in millions of dollars)

	1986	1987	1988	1989	1990
Judicial Survivors' Annuities Fund:					
Budget authority.....	1.9	2.0	2.1	2.2	2.3
Outlays.....	(¹)	(¹)	(¹)	(¹)	(¹)
Revenues.....	.3	.3	.3	.3	.3
Reduction in deficit.....	.3	.3	.3	.3	.3
Fees: Revenues.....	.1	.1	.1	.1	.1
Travel expenses:					
Estimated authorization level.....	.3	.3	.3	.4	.4
Estimated outlays.....	.3	.3	.3	.4	.4
Total budget authority/estimated authorization level.....	2.2	2.3	2.4	2.6	2.7
Total estimated outlays.....	.3	.3	.3	.4	.4
Total revenues.....	.4	.4	.4	.4	.4
Total reduction in deficit.....	.1	.1	.1	0	0

¹ The costs of the Judicial Survivors' Annuities Fund fall within budget function 600. The costs of fees and travel expenses fall within budget function 750.

Basis of Estimate: This bill would make several changes to the Judicial Survivors' Annuities Program resulting in a net increase of funds flowing into the Judicial Survivors' Annuities Fund (JSA) in the 1986 through 1990 period. The bill would increase the payroll tax on judges and justices from 4.5 percent of salary to 5 percent. Benefits to new recipients would be liberalized and the resulting unfunded liability created would be eliminated through government payments.

CBO estimates an increase in revenues to the JSA Fund of \$0.3 million in each fiscal year as a result of the 0.5 percent increase in the payroll tax. Budget Authority for the Fund is expected to increase by about \$1.9 million in fiscal year 1986 as a result of enactment of this legislation. This increase would grow to about \$2.3 million by 1990. As specified in the bill, there would be deposited into the Fund an amount necessary to eliminate the unfunded liability created by the newer, higher benefits. We estimate the amount of the deposit needed to be about \$1.9 million in fiscal year

1986. This amount would increase over time as judges salaries increase. The deposits would be made from the appropriation used to pay judges salaries. We assume the additional funding needed would result in larger appropriations to the judicial salary account. This payment would be an intragovernmental transaction and would have no effect on the total budget deficit.

The estimate of government payments to eliminate the newly created unfunded liability is based on a 1981 report prepared by Segal and Company and information provided by the Administrative Office of the United States Courts. The report estimated the full cost of the benefit package found in H.R. 3570 to be about 13.2 percent of total salary paid to judges and justices. Under the bill, judicial officials would contribute 5 percent of total salary to the fund. The remaining cost would be paid by the federal government resulting in an increase in the government's share of about 3.7 percent of judicial payroll.

Increased benefits paid to new recipients are expected to result in outlay increases to the fund of less than \$50,000 in each fiscal year through 1990. Outlay increases are expected to be greater beyond our projection period as new eligibles begin to receive compensation under the program.

Estimates relating to the JSA Fund assume no change in the rate of judicial officials' participation in the program. Revenues collected by the fund and payments made by the federal government to eliminate the unfunded liability could be higher or lower if participation rates rise or fall as a result of this bill.

Section 4 of the bill would raise the ceiling on travel expenses for judges and justices for periods of less than 30 days. Costs for this provision were estimated based on analysis of average lodging and meal cost data provided by the Administrative Office of the United States Courts.

Section 5 of the bill would raise the filing fee collected by the District Court of the District of Columbia from \$15 to \$60. There were an estimated 2,300 private civil case filings in 1985. If a similar number of cases were filed in 1986 through 1990, additional miscellaneous revenues of up to \$100,000 could be expected each year.

It is expected that the remaining sections of the bill would result in no additional cost to the federal government.

6. Estimated cost to State and local government: The budgets of state and local governments will not be affected directly by the enactment of this bill.

7. Estimate comparison: None.

8. Previous CBO estimate: None.

9. Estimate prepared by: Carmela Dyer.

10. Estimate approved by: C.G. Nuckols (for James L. Blum, Assistant Director for Budget Analysis).

COMMITTEE VOTE

H.R. 3570 was reported favorably by voice vote, no objection being heard, and a quorum of Members being present.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 28, UNITED STATES CODE

PART I—ORGANIZATION OF COURTS

CHAPTER 17—RESIGNATION AND RETIREMENT OF JUSTICES AND JUDGES

§ 376. Annuities for survivors of certain judicial officials of the United States.

(a) For the purposes of this section—

(1) "judicial office" means:

(A) . . .

(C) a Director or Deputy Director of the Administrative Office of the United States Courts, after he or she has filed a waiver under subsection (a) of section 611 of this title;

(D) a Director of the Federal Judicial Center, after he or she has filed a waiver under subsection (b) of section 627 of this title; or

(E) an administrative assistant to the Chief Justice of the United States, after he or she has filed a waiver in accordance with both subsection (a) of section 677 and subsection (a) of section 611 of this title;

who notifies the Director of the Administrative Office of the United States Courts in writing of his or her intention to come within the purview of this section within six months after (i) the date upon which he or she takes office, (ii) the date upon which he or she marries, [or (iii) the date upon which the Judicial Survivors' Annuities Reform Act becomes effective;] (iii) January 1, 1977; or (iv) January 1, 1986;

(2) "retirement salary" means:

(A) . . .

(C) in the case of a Director or Deputy Director of the Administrative Office of the United States Courts, an annuity paid under subsection (b) or (c) of section 611 of this title;

(5) "child" means:

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(A) an unmarried child under eighteen years of age, including (i) an adopted child and (ii) a stepchild or recognized natural child who lived with the judicial official in a regular parent-child relationship;

(B) such unmarried child between eighteen and twenty-two years of age who is a student regularly pursuing a full-time course of study or training in residence in a high school, trade school, technical or vocational institute, junior college, college, university, or comparable educational institution. A child whose twenty-second birthday occurs before July 1, or after August 31, of a calendar year, and while he or she is regularly pursuing such a course of study or training, is deemed to have become twenty-two years of age on the first day of July immediately following that birthday. A child who is a student is deemed not to have ceased being a student during an interim period between school years, if that interim period lasts no longer than five consecutive months and if that child shows, to the satisfaction of the Director of the Administrative Office of the United States Courts, that he or she has a bona fide intention of continuing to pursue a course of study or training in the same or a different school during the school semester, or other period into which the school year is divided, immediately following that interim period; or

(C) such unmarried child, regardless of age, who is incapable of self-support because of a mental or physical disability incurred either (i) before age eighteen, or (ii) in the case of a child who is receiving an annuity as a full-time student under subparagraph (5)(B) of this subsection, before the termination of that annuity [.] and

(6) "former spouse" means a former spouse of a judicial official if the former spouse was married to such judicial official for at least 9 months.

(b) Every judicial official who files a written notification of his or her intention to come within the purview of this section, in accordance with paragraph (1) of subsection (a) of this section, shall be deemed thereby to consent and agree to having deducted and withheld from his or her salary, including any "retirement salary", a sum equal to [4.5] 5 percent of that salary. The amounts so deducted and withheld from the salary of each such judicial official shall, in accordance with such procedures as may be prescribed by the Comptroller General of the United States, be covered into the Treasury of the United States and credited to the "Judicial Survivors' Annuities Fund" established by section 3 of the Judicial Survivors' Annuities Reform Act. Such fund shall be used for the payment of annuities, refunds, and allowances as provided by this section. Payment of such salary less such deductions shall be a full and complete discharge and acquittance of all claims and demands whatsoever for all services rendered by such judicial official during the period covered by such payment, except the rights to those benefits to which such judicial official, or his or her survivors, shall be entitled under the provisions of this section.

[(c) There shall also be deposited to the credit of the "Judicial Survivors' Annuities Fund", in accordance with such procedures as may be prescribed by the Comptroller General of the United States, amounts matching those deducted and withheld in accordance with subsection (b) of this section. Such deposits shall be taken from the funds used to pay the compensation of the judicial official, and shall immediately become an integrated part of the "Judicial Survivors' Annuities Fund" for any use required under this section.]

(c)(1) There shall also be deposited to the credit of the Judicial Survivors' Annuities Fund, in accordance with such procedures as the Comptroller General of the United States may prescribe, amounts required to reduce to zero the unfunded liability of the Judicial Survivors' Annuities Fund. Such deposits shall be taken from the fund used to pay the compensation of the judicial official, and shall immediately become an integrated part of the Judicial Survivors' Annuities Fund for any use required under this section.

(2) For purposes of paragraph (1), the term "unfunded liability" means the estimated excess, determined by the Comptroller General on an annual basis, of the present value of all benefits payable from the Judicial Survivors' Annuities Fund, over the sum of—

(A) the present value of deductions to be withheld from the future basic pay of judicial officials; plus

(B) the balance in the Fund as of the date the unfunded liability is determined.

In making any determination under this paragraph, the Comptroller General shall use the applicable information contained in the reports filed pursuant to section 9503 of title 31, United States Code, with respect to the judicial survivors annuities plan established by this section.

(d) Each judicial official shall deposit, with interest at 4 percent per annum to December 31, 1947, and at 3 percent per annum thereafter, compounded on December 31 of each year, to the credit of the "Judicial Survivors' Annuities Fund":

(1) a sum equal to [4.5] 5 percent of that salary, including "retirement salary", which he or she has received for serving in any of the offices designated in paragraph (1) of subsection (a) of this section prior to the date upon which he or she filed notice of an intention to come within the purview of this section with the Director of the Administrative Office of the United States Courts; and

(2) a sum equal to [4.5] 5 percent of the basic salary, pay, or compensation which he or she has received for serving as a Senator, Representative, Delegate, or Resident Commissioner in Congress, or for serving as an "employee", as that term is defined in subsection (1) of section 8331 of title 5, prior to assuming the responsibilities of any of the offices designated in paragraph (1) of subsection (a) of this section.

The interest otherwise required by this subsection shall not be required for any period during which a judicial official was separated from all such service and was not receiving any retirement salary.

Each such judicial official may elect to make such deposits in installments, during the continuance of his or her service in those offices designated in paragraph (1) of subsection (a) of this section, in

such amounts and under such conditions as may be determined in each instance by the Director of the Administrative Office of the United States Courts: *Provided*, That, in each instance in which a judicial official does elect to make such deposits in installments, the Director shall require (i) that the first installment payment made shall be in an amount no smaller than that amount necessary to cover at least the last eighteen months of prior creditable civilian service, and (ii) that at least one additional installment payment shall be made every eighteen months thereafter until the total of all such deposits have been made.

Notwithstanding the failure of any such judicial official to make all such deposits or installment payments, credit shall be allowed for the service rendered, but the annuity of that judicial official's widow or widower shall be reduced by an amount equal to 10 percent of the amount of such deposits, computed as of the date of the death of such judicial official, unless such widow or widower shall elect to eliminate such service entirely from credit under subsection (k) of this section: *Provided*, That no deposit shall be required from any such judicial official for any honorable active duty service in the Army, Navy, Air Force, Marine Corps, or Coast Guard of the United States, or for any other creditable service rendered prior to August 1, 1920.

(h) annuities payable under this section shall be paid only in accordance with the following provisions:

(1) In any case in which a judicial official dies while in office, or while receiving "retirement salary," after having completed at least eighteen months of creditable civilian service, as computed in accordance with subsection (k) of this section, for the last eighteen months of which the salary deductions provided by subsection (b) of this section or, in lieu thereof, the deposits required by subsection (d) of this section have actually been made—

(A) * * *

(B) if such judicial official is survived by a widow or widower and a child or children, there shall be paid to such widow or widower an annuity, beginning on the day on which such judicial official died, in an amount computed as provided in subsection (l) of this section, and there shall also be paid to or on behalf of each such child an immediate annuity equal to:

[(i) \$1,548; or

[(ii) \$4,644, divided by the number of children;]

(i) 10 percent of the average annual salary determined under subsection (l)(1) of this section; or

(ii) 20 percent of such average annual salary, divided by the number of children;

whichever is smallest; or

(C) if such judicial official leaves no surviving widow or widower, but does leave a surviving child or children, there shall be paid to or on behalf of each such child an immediate annuity equal to:

(i) the amount of the annuity to which the judicial official's widow or widower would have been entitled under subparagraph (1)(A) of this subsection, had such widow or widower survived the judicial official, divided by the number of children; or

[(ii) \$1,860; or

[(iii) \$5,580, divided by the number of children;]

(ii) 20 percent of the average annual salary determined under subsection (1)(1) of this section; or

(iii) 40 percent of such average annual salary amount, divided by the number of children;

whichever is smallest.

(2) An annuity payable to a widow or widower under subparagraphs (1)(A) or (1)(B) of this subsection shall be terminated upon his or her death or remarriage *before attaining age 55*.

(1) The annuity of a widow or widower of a judicial official shall be an amount equal to the sum of—

(1) [1%] 1.5 percent of the average annual salary, including retirement salary, which such judicial official received for serving in any of the offices designated in paragraph (1) of subsection (a) of this section (i) during those three years of such service in which his or her annual salary was greatest, or (ii) if such judicial official has so served less than three years, but more than eighteen months, then during the total period of such service prior to his or her death, multiplied by the total of:

(A) the number of years of creditable service tabulated in accordance with paragraph (1) of subsection (k) of this section; plus

(B) the number of years of creditable service tabulated in accordance with paragraph (2) of subsection (k) of this section; plus

(C) the number of years of creditable service tabulated in accordance with paragraph (3) of subsection (k) of this section; plus

(D) the number of years up to, but not exceeding, fifteen of creditable service tabulated in accordance with paragraph (4) of subsection (k) of this section,

plus

(2) three-fourths of 1 percent of such average annual salary, multiplied by the number of years of any prior creditable service, as tabulated in accordance with subsection (k) of this section, not applied under paragraph (1) of this subsection [:];

[Provided, That such annuity shall not exceed 40 percent of such average annual salary and shall be further reduced in accordance with subsection (d) of this section, if applicable.]

except that such annuity shall not exceed an amount equal to 55 percent of such average annual salary, nor be less than an amount equal to 30 percent of such average annual salary. Any annuity determined in accordance with the provisions of this subsection shall be reduced to the extent required by subsection (d) of this section,

and by the amount of any annuity payable to a former spouse under subsection (t).

(n) Each annuity authorized under this section shall accrue monthly and shall be due and payable in monthly installments on the first business day of the month following the month or other period for which the annuity shall have accrued. No annuity authorized under this section shall be assignable, either in law or in equity, except as provided in subsections (s) and (t), or subject to execution, levy, attachment, garnishment, or other legal process.

(o) In any case in which a judicial official dies while in office, or while receiving "retirement salary", and;

(1) before having completed eighteen months of civilian service, computed in accordance with subsection (k) of this section, during which the salary deductions provided by subsection (b) of this section or the deposit required by subsection (d) of this section have actually been made; or

(2) after having completed eighteen months of civilian service, computed in accordance with subsection (k) of this section, during which all such deductions or deposits have been made, but without a survivor or survivors who are entitled to receive the annuity benefits provided by subsection (h) or (t) of this section; or

(3) the rights of all persons entitled to receive the annuity benefits provided by subsection (h) or (t) of this section terminate before a valid claim therefor has been established;

(s) A judicial official who has a former spouse may elect, under procedures prescribed by the Director of the Administrative Office of the United States Courts, to provide a survivor annuity for such former spouse under subsection (t). An election under this subsection shall be made at the time of retirement, or, if later, within 2 years after the date on which the marriage of the former spouse to the judicial official is dissolved. An election under this subsection—

(1) shall not be effective to the extent that it—

(A) conflicts with—

(i) any court order or decree referred to in subsection (t)(1), which was issued before the date of such election, or

(ii) any agreement referred to in such subsection which was entered into before such date; or

(B) would cause the total of survivor annuities payable under subsections (h) and (t) based on the service of the judicial official to exceed 55 percent of the average annual salary (as such term is used in subsection (1)) of such official; and

(2) shall not be effective, in the case of a judicial official who is then married, unless it is made with the spouse's written consent.

The Director of the Administrative Office of the United States Courts shall provide by regulation that paragraph (2) of this subsection may be waived if the judicial official establishes to the satis-

faction of the Director that the spouse's whereabouts cannot be determined, or that, due to exceptional circumstances, requiring the judicial official to seek the spouse's consent would otherwise be inappropriate.

(1) Subject to paragraphs (2) through (4) of this subsection, a former spouse of a deceased judicial official is entitled to a survivor annuity under this section if and to the extent expressly provided for in an election under subsection (s), or in the terms of any decree of divorce or annulment or any court order or court-approved property settlement agreement to such decree.

(2) The annuity payable to a former spouse under this subsection may not exceed the difference between—

(A) the maximum amount that would be payable as an annuity to a widow or widower under subsection (1), determined without taking into account any reduction of such annuity caused by payment of an annuity to a former spouse; and

(B) the amount of any annuity payable under this subsection to any other former spouse of the judicial official, based on an election previously made under subsection (s), or a court order previously issued.

(3) The commencement and termination of an annuity payable under this subsection shall be governed by the terms of the applicable order, decree, agreement, or election, as the case may be, except that any such annuity—

(A) shall not commence before—

(i) the day after the judicial official dies, or

(ii) the first day of the second month beginning after the date on which the Director of the Administrative Office of the United States Courts receives written notice of the order, decree, agreement, or election, as the case may be, together with such additional information or documentation as the Director may prescribe.

whichever is later, and

(B) shall terminate no later than the last day of the month before the former spouse remarries before becoming 55 years of age or dies.

(4) For purposes of this section, a modification in a decree, order, agreement, or election referred to in paragraph (1) of this subsection shall not be effective—

(A) if such modification is made after the retirement of the judicial official concerned, and

(B) to the extent that such modification involves an annuity under this subsection.

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CHAPTER 21—GENERAL PROVISIONS APPLICABLE TO COURTS AND JUDGES

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§ 456. Traveling expenses of justices and judges; official duty stations

(a) The Director of the Administrative Office of the United States Courts shall pay each justice or judge of the United States, and each retired justice or judge recalled or designated and assigned to active duty, while attending court or transacting official business at a place other than his official duty station [for any continuous period of less than thirty calendar days (1) all necessary transportation expenses certified by the justice or judge; and (2) a per diem allowance for travel at the rate which the Director establishes not to exceed the maximum per diem allowance fixed by section 5702(a) of title 5, or in accordance with regulations which the Director shall prescribe with the approval of the Judicial Conference of the United States, reimbursement for his actual and necessary expenses of subsistence not in excess of the maximum amount fixed by section 5702 of title 5. The Director of the Administrative Office of the United States Courts shall also pay each justice or judge of the United States, and each retired justice or judge recalled or designated and assigned to active duty, while attending court or transacting official business under an assignment authorized under chapter 13 of this title which exceeds in duration a continuous period of thirty calendar days, all necessary transportation expenses and actual and necessary expenses of subsistence actually incurred, notwithstanding the provisions of section 5702 of title 5, in accordance with regulations which the Director shall prescribe with the approval of the Judicial Conference of the United States.]

(1) all necessary transportation expenses; and (2) a per diem allowance for travel at the rate which the Director establishes not to exceed the maximum per diem allowance fixed by section 5702(a) of title 5, or actual and necessary expenses of subsistence actually incurred, notwithstanding the provisions of section 5702 of title 5, United States Code, in accordance with regulations which the Director shall prescribe with the approval of the Judicial Conference of the United States. In determining necessary expenses, the Director shall take into account the reasonable costs of transportation and subsistence generally incurred for travel to the geographic area involved.

PART III—COURT OFFICERS AND EMPLOYEES

CHAPTER 42—FEDERAL JUDICIAL CENTER

§ 620. Federal Judicial Center

(a) * * *

(b) The Center shall have the following functions:

(1) to conduct research and study of the operation of the courts of the United States, and to stimulate and coordinate

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such research and study on the part of other public and private persons and agencies;

(2) to develop and present for consideration by the Judicial Conference of the United States recommendations for improvement of the administration and management of the courts of the United States;

(3) to stimulate, create, develop, and conduct programs of continuing education and training for personnel of the judicial branch of the Government, including, but not limited to, judges, [referees,] clerks of court, probation officers, and United States [commissioners;] magistrates; and

PART IV—JURISDICTION AND VENUE

CHAPTER 85—DISTRICT COURTS: JURISDICTION

Sec. 1330 Action against foreign states

1364. Direct actions against insurers of members of diplomatic missions and their families.

[1364. Senate actions.

[1364. Construction of references to laws of the United States or Act of Congress.]

1365. Senate Actions.

1366. Construction of references to laws of the United States or Acts of Congress.

[§ 1364] § 1365 Senate action

(a) The United States District Court for the District of Columbia shall have original jurisdiction, without regard to the amount in controversy, over any civil action brought by the Senate or any authorized committee or subcommittee of the Senate to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal or failure to comply with, any subpoena or order issued by the Senate or committee or subcommittee of the Senate to any entity acting or purporting to act under color or authority of State law or to any natural person to secure the production of documents or other materials of any kind or the answering of any deposition or interrogatory or to secure testimony or any combination thereof. This section shall not apply to an action to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal to comply with, any subpoena or order issued to an officer or employee of the Federal Government acting within the official capacity.

[§ 1364.] § 1366. Construction of references to laws of the United States or Acts of Congress

For the purposes of this chapter, references to laws of the United States or Acts of Congress do not include laws applicable exclusively to the District of Columbia.

CHAPTER 89—DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

§ 1441. Actions removable generally

(a) * * *

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

PART V—PROCEDURE

CHAPTER 123—FEES AND COSTS

§ 1914. District court; filing and miscellaneous fees; rules of court

(a) The clerk of each district court shall require the parties instituting any civil action, suit or proceeding in such court, whether by original process, removable or otherwise, to pay a filing fee of \$60, except that on application for a writ of habeas corpus filing fee shall be \$5.

(b) The clerk shall collect from the parties such additional fees only as are prescribed by the Judicial Conference of the United States.

(c) Each district court by rule or standing order may require advance payment of fees.

[(d) This section shall not apply to the District of Columbia.]

PART VI—PARTICULAR PROCEEDINGS

**CHAPTER 158—ORDERS OF FEDERAL AGENCIES;
REVIEW**

§ 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communication Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

[(3) such final orders of the Federal Maritime Commission or the Maritime Administration entered under chapters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46;]

(3) all rules, regulations, or final orders of—

(A) the Secretary of Transportation issued pursuant to section 2, 9, 37, 41 or 43 of the Shipping Act, 1916 (46 U.S.C. App. 839); and

(B) the Federal Maritime Commission issued pursuant to—

(i) section 23, 25, or 43 of the Shipping Act, 1916 (46 U.S.C. App. 822, 824, or 841a);

(ii) section 19 of the Merchant Marine Act, 1920 (46 U.S.C. App. 876);

(iii) section 2, 3, 4, or 5 of the Intercoastal Shipping Act, 1933 (46 U.S.C. App. 844, 845, 845a, or 845b);

(iv) section 14 or 17 of the Shipping Act of 1984 (46 U.S.C. App. 1713 or 1716); or

(v) section 2(d) or 3(d) of the Act of November 6, 1966 (46 U.S.C. App. 817d(d) or 817d(d));

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SECTION 705 OF THE ETHICS IN GOVERNMENT ACT OF 1978

INSTITUTING A CIVIL ACTION TO ENFORCE A SUBPENA

SEC. 705. (a) When directed to do so pursuant to section 703(b), the Counsel shall bring a civil action under any statute conferring jurisdiction on any court of the United States (including section [1364] 1365 of title 28 of the United States Code, as added by subsection (f)(1) of this section), to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened failure or refusal to comply with, any subpoena or order issued by the Senate or a committee or a subcommittee of the Senate authorized to issue a subpoena or order.

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